(30,154)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 301

SOUTHERN ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

FRANCIS R. STODDARD, JR., SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 11, 1924

Notice of Appeal.

Supreme Court,

NEW YORK COUNTY.

In the Matter

of

The Application of the People of the State of New York, by JESSE S. PHILLIPS, Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

Surety Claim #573-V.

In the Matter

of

The Claim of the SOUTHERN ELECTRIC COMPANY.

Please take notice that the claimant Southern Electric Company above named hereby appeals to the Appellate Division of the New York Supreme Court in and for the First Department, from the final order of the Supreme Court, entered herein in the office of the Clerk of the County of New York on the 29th day of May, 1923, whereby it was ordered that the motion of the Superintendent of Insurance, as Liquidator of the

Southern Electric Company against the Estate of the Casualty Company of America designated in this proceeding as Surety Claim #573-V, and said motion having regularly come on to be heard,

Now, upon reading the order directing the liquidation of the Casualty Company of America entered herein on May 4th, 1917; so much of the report of Jesse S. Phillips as Superintendent of Insurance of the State of New York as Liquidator of the Casualty Company of America filed herein on July 11th, 1921, as disallows the claim
11 of the Southern Electric Company, designated herein as Surety Claim #573-V, against the Estate of the Casualty Company of America; the order of reference entered herein on the 3rd day of September, 1921, referring said claim to William W. Pellet, Esq., to hear, take evidence and report thereon; the objections to the disallowance of the claim of the Southern Electric Company, dated August 26th, 1921, and verified August 26th, 1921, and duly filed herein; the answer of the Superintendent of Insurance verified April 29th, 1922, and duly filed herein; the oath of the referee duly sworn to May 3rd, 1922;
12 the summons of the referee served on the claimant's attorney and due proof of the service thereof; the opinion of the referee heretofore filed herein; the report of the referee recommending the allowance and dismissal of said claim heretofore filed herein; the notice of motion with proof of due service of a copy thereof upon the attorneys for the claimant; the proposed findings of fact and conclusions of law submitted by the claimant; the minutes of the hearing before the said referee and all the testimony taken thereat

and all the evidence and exhibits given therein, and upon all the papers in the above entitled proceeding, and all the proceedings had herein, and after hearing Torrey A. Ball of Counsel for the Superintendent of Insurance as Liquidator of the Casualty Company of America in support of the motion to dismiss and disallow the claim of the Southern Electric Company upon the report of the referee, and Arthur F. Gotthold in opposition to said motion for the disallowance of said claim, and due deliberation having been had thereon, and the court having granted the said motion of the Superintendent of Insurance as liquidator of the Casualty Company of America to dismiss and disallow the claim of the Southern Electric Company upon the report and recommendation of the referee and on filing the opinion of the Court upon motion of Clarence C. Fowler, attorney for the Superintendent of Insurance as liquidator of the Casualty Company of America herein, it is hereby

ORDERED, that the motion of the Superintendent of Insurance as Liquidator of the Casualty Company of America to dismiss and disallow the claim of the Southern Electric Company upon the report of the referee herein be and the same hereby is granted, and it is further

ORDERED, that the claim of the Southern Electric Company designated herein as Surety Claim No. 573-V against the Estate of the Casualty Company of America for the sum of $201.23, be and the same hereby is dismissed and disallowed.

Enter,

J. O'M.,
J. S. C.

16 **Order of Liquidation of Casualty Company of America.**

At a Special Term of the Supreme Court, Part I thereof, for motions, held at the County Court House, in the Borough of Manhattan, City of New York on the 4th day of May, 1917.

Present: Hon. Leonard A. Giegerich, Justice.

In the Matter

17 *of*

The Application of the People of the State of New York, by Jesse S. Phillips, as Superindent of Insurance, for an order to take possession of the property and liquidate the business of the Casualty Company of America.

Upon reading the petition of Jesse S. Phillips, Superintendent of Insurance, duly verified the 4th day of May, 1917, with the exhibits thereto
18 attached, and the order to show cause thereon, granted by Mr. Justice Mitchell L. Erlanger, on the 3rd day of May, 1917, and proof of due service of the said order to show cause upon the Casualty Company of America, by the affidavit of Moses James Wright, duly verified the 4th day of May, 1917; and the notice of appearance of Lyman A. Spalding Esq., and it appearing therefrom that the said Casualty Company of America is a domestic corporation organized under the laws of the State of New York, with authority

to transact business under subdivisions II, III, IV, V, VI, VII, VIII and IX of Section 70 of the Insurance Law, and that it is subject to supervision and examination by the Superintendent of Insurance, and that it has its principal office at No. 68 William Street, Borough of Manhattan, City, County and State of New York; and that it was, on or about the 3rd day of May, 1917, examined by C. A. Wheeler, acting under an appointment by the Superintendent of Insurance, for the purpose of ascertaining the condition of its business and affairs; and it appearing therefrom that the said Casualty Company of America is now insolvent and has been found, after an examination, to be in such a condition that its further transaction of business is hazardous to its policyholders, its creditors and the public, and the said order to show cause having duly come on to be heard; 20

Now, after hearing Merton E. Lewis, Attorney-General, representing the Superintendent of Insurance, by Robert S. Conklin, Deputy Attorney-General, in support of the said motion and Lyman A. Spalding, Esq., appearing in behalf of the said corporation, and consenting and no one else appearing in opposition thereto, and due deliberation having been had, upon motion of the said Merton E. Lewis, Esq., it is 21

ORDERED, that Jesse S. Phillips, and his successors in office as Superintendent of Insurance be, and he hereby is, directed to take possession of the property and liquidate the business of the said Casualty Company of America, under and pursuant to Section 63 of the Insurance Law, and

they are hereby vested with title to all of the property, contracts and rights of action of the said company, and directed to deal with the same in their own names as Superintendent of Insurance; and the said Casualty Company of America, its officers, agents and employees, and all other persons having any property or effects of the said corporation are hereby directed forthwith to assign, transfer and deliver to the said Superintendent of Insurance, all the said property or effects in whosesoever name the same may be; and

23 it is further

ORDERED, that the officers, agents and employees of the said company, and all other persons be, and they hereby are, enjoined and restrained from the further transaction of the business of the said corporation, or from dealing with or disposing of the property or assets of the said Casualty Company of America, or from in any way interfering with the said Superintendent of Insurance in the performance of his duties as liquidator; and, until the further order of this Court, it is

ORDERED, that the officers, agents, employees,

24 policyholders, stockholders and creditors of the said Casualty Company of America, and all other persons, be enjoined and restrained from bringing or further prosecuting any action at law, suit in equity or special proceeding against said corporation, or estate, and from making or executing any levy upon the property or assets of the said Casualty Company of America, or from in any way interfering with the said Superintendent of Insurance, or his successors in office in the control and management of the property of the said

Order of Liquidation of Casualty Company of America. 25
Proof of Claim of Claimant, Southern Electric Company.

corporation or in the discharge of his or their duties as liquidators thereof.

Enter,

L. A. G.,
J. S. C.

Proof of Claim of Claimant, Southern Electric Company.

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SUPREME COURT,

NEW YORK COUNTY.

In the Matter *of* The liquidation of the CASUALTY COMPANY OF AMERICA.	Amount of Claim, $203.18.

Name of claimant, Southern Electric Company.

Post office address of claimant, 16 Light Street, 27
Baltimore, Md.

Name of attorney (if any) by whom claimant is represented, Pomerene, Ambler & Pomerene.

Post office address of such attorney, Canton, Ohio.

State whether claimant is a corporation, co-partnership, association or individual. Corporation.

The following is a statement of the nature of

28 Proof of Claim of Claimant, Southern Electric Company.

the claim and the facts upon which it is based, the place where and date upon which it arose, the date of policy or bond and number, and name of assured, injured or beneficiary, etc.

State in detail what proceedings have been taken to enforce this claim against the Casualty Company of America. (SOUTHERN ELECTRIC Co. By LOUIS LOHRFINK, Treas.)

CITY OF BALTIMORE,)
State of Maryland,) ss.:

29

LOUIS LOHRFINK, being duly sworn, says that he is Treasurer of the Southern Electric Co., the claimant herein; that the foregoing claim against the Casualty Company of America is in all respects just and true; that no payment has been made thereon; that there are no offsets or counterclaims thereto; that the said claim is not secured in whole or in part by any judgment or by any mortgage or other lien upon real estate; and is not secured in any way whatsoever; and that no note or bond has been given therefor except as mentioned in the said claim.

30 LOUIS LOHRFINK.

Sworn to before me this 20th day of March, 1919.

JAMES BIMESTEFER,
[SEAL] Notary Public.

Proof of Claim of Claimant, Southern Electric Company. 31

Statement

To Southern Electric Co., Dr.

16 Light Street

Baltimore, Md., Feby 28, 1919

John G. Unkefer & Co.

Minerva

Ohio

Terms—30 Days Net

May	17, 1917.....	167.89
June	14, 1917.....	33.64
"	20, 1917.....	1.65

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$203.18

Southern Electric Company

16 Light Street

Baltimore, Md.

Our Order Number 55839

Our Bill Number 69003

May 7, 1917.

Sold to John G. Unkefer & Co.,
Minerva, Ohio.

Ship to ditto Charlotte, N. C.

Salesman, Mail. Date Sold, 3/10/17. Date Shipped, 5/1/18. Ship via f. o. b. Balto. Southern Rwy. 33

Agents for Edison Mazda Lamps

Quantity Shipped	Description	Price	Amount
53	#GE 632 SP Flush sws...	26.35 C	13.97
30	#5506 Hubbell flush receptes.	.80 ea.	16.00
40	#5418 Hubbell flush receptes. complete	1.20 ea.	48.00
11	#60492 Br. Br. two gang sw plates	75.00 C	8.25
1	#60493 Br. Br. three gang ditto	112.50 C	1.13

34 Proof of Claim of Claimant, Southern Electric Company.

65	#49752 Br. Br. single gang ditto	37.50 C	24.38
120	#3606 Br. Br. Bryant single gang telephone plates with 3/8" bushing	46.80 C	56.16
			167.89

2½% cash 10 days.

SOUTHERN ELECTRIC COMPANY

16 Light Street

35 Baltimore, Md.

Our Order Number 57553
Our Bill Number 73063
June 14, 1917.

Sold to John G. Unkefer & Co.,
Minerva, Ohio.
Ship to ditto Charlotte, N. C.
Salesman. Mail. Date Sold, 3/10/17. Date Shipped, 6/8/17. Ship via f. o. b. Balto. Southern Rwy.

Agents for Edison Mazda Lamps

Quantity Shipped	Description	Price	Amount
36 37	GE 688 S. P. Locking flush Sws.	90.10 C	33.34

SOUTHERN ELECTRIC COMPANY

16 Light Street

Baltimore, Md.

June 20, 1918.

Sold to John G. Unkefer & Co.,
Minerva, Ohio.

Agents for Edison Mazda Lamps

Description	Amount
To protest fees on return of check of June 11, 1918. 100.00 (not sufficient funds)	1.65

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Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant.

SUPREME COURT OF NEW YORK,

COUNTY OF NEW YORK.

In the Matter *of* The Application of the People of the State of New York, by JESSE S. PHILLIPS, Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.	County Clerk's No. 15434-1917.

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TO THE SUPREME COURT OF THE STATE OF NEW YORK IN AND FOR THE FIRST JUDICIAL DISTRICT.

I, JESSE S. PHILLIPS, Superintendent of Insurance of the State of New York, do hereby make report concerning the affairs of the Casualty Company of America; the proceedings had and the things done in the liquidation thereof with my comprehensive audit and report showing facts, conclusions and recommendations, upon information and belief:

39

I.—By an order of the Supreme Court of the State of New York, made and entered in the office of the Clerk of the County of New York on the 4th day of May, 1917, I was directed forth-

40 Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant.

with to take possession of the property and liquidate the business of the Casualty Company of America, under and pursuant to the provisions of Section 63 of the Insurance Law of this State.

II.—Pursuant to the terms of said order and of the power and authority vested in me by statute and immediately upon the entry of said order, I appointed Moses J. Wright, Esq., an attorney and counsellor at law of this Court, a Special
41 Deputy Superintendent of Insurance and my statutory agent to liquidate the Casualty Company of America. Thereafter and on the 15th day of January, 1918, I appointed Clarence H. Fay, Esq., a Special Deputy, in the place and stead of Mr. Wright. Thereafter and on the 1st day of January, 1920, I appointed Clarence C. Fowler, Esq., Special Deputy in the place and stead of Mr. Fay.

III.—Annexed hereto and marked Exhibit A, and hereby made a part of this my comprehensive report and petition is a verified report made by said Clarence C. Fowler showing the pro-
42 ceedings had and taken in the liquidation of the Casualty Company of America from May 4, 1917, to and including the 31st day of May, 1921.

IV.—From said report of said Clarence C. Fowler, hereinbefore referred to and marked Exhibit A, it appears that said Moses J. Wright immediately upon the entry of the order of liquidation on May 4, 1917, took possession of the business and affairs of the Casualty Company of America, and of its property, books.

Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant. 43

documents, records and correspondence, and forthwith gave formal notice of the making and entry of said order of liquidation including a notice that claims should be filed with him on or before the 15th day of August, 1917, and a general demand that all assets and property should be immediately surrendered to him as the statutory agent of your petitioner and that all claims against the Casualty Company of America would be determined and the assets thereof would be distributed to its creditors, policyholders, stockholders and all other persons interested in its 44
affairs without further notice to persons failing to comply with the directions contained in said notice. Copies of said notice and proof of service thereof is annexed to and made a part of antecedent reports filed in the above entitled proceeding.

V.—Pursuant to said formal notice and demand for surrender and delivery of assets, many persons have filed and presented their claims pursuant to said notice and otherwise, and all claims filed, presented or known to exist have been investigated and determined 45
or suspended for further investigation and such claims are included herein and recommended for allowance, disallowance or suspension as the case may be in accordance with the facts found respectively in each case as more fully appears from the report of Clarence C. Fowler, hereinbefore referred to and marked Exhibit A.

VI.—The said report of Clarence C. Fowler, hereinbefore referred to and marked Exhibit A,

46 Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant.

contains a financial statement showing the assets of the Casualty Company of America received on May 4th, 1917, acquisitions and additions thereto, the cash realized therefrom, total cash receipts and disbursements made or allowed in the liquidation proceeding from May 4th, 1917, to and including the 31st day of May, 1921. From said statement it appears that the total ledger assets on May 31, 1921, amounted to $3,255,237.65. The cash in bank amounted to $135,045.18, and the
47 stocks, bonds and other securities available for sale and conversion into cash if sold at the market value prevailing on May 31, 1921, would make the total cash immediately available for a first dividend the sum of $913,818.00. If the stocks and bonds are not sold in the present low market and only the cash in banks and the United States Treasury Certificates due September 15th, 1921, are used, the cash immediately available for a first dividend would be $770,245.18.

VII.—Annexed to and made a part of the report of Clarence C. Fowler, hereinbefore referred to and marked Exhibit A, is a list of all claims,
48 debts and liabilities which have been filed or presented pursuant to said liquidation notice and request to file claims and which are otherwise known to exist. Said list is composed of Exhibits C, D and E hereto annexed and made a part hereof. All of said claims, debts and liabilities have been investigated and examined and have been classified and recommended for allowance, disallowance or suspension in accordance with the facts in each case respectively found. The liabilities are composed of two classes:

Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant. 49

1. The claims predicated on bonds or contracts of insurance or re-insurance issued by the Casualty Company of America prior to May 4th, 1917, are insurance liabilities.

2. The claims not predicated upon bonds or contracts of insurance or re-insurance are general liabilities.

The insurance liabilities are contained in the lists marked a, b, c, d, e, f, g, h and i of Schedule I and II of Exhibits C, D and E. The general 50
liabilities are contained in the lists marked j, k, l, m, n, and o of Schedules I and II of Exhibits C, D and E. Exhibit C contains a list of all allowed claims. Exhibit D contains a list of all disallowed claims. Exhibit E contains a list of all unadjusted claims which are suspended for action at a later time. The total amount of claims recommended for allowance is $957,994.60 of which $686,895.73 represents insurance claims and $271,098.87 general claims. The total amount of claims unadjusted and suspended is $1,811,000.02 of which $1,767,823.32 represents insurance claims and $43,176.70 general claims. I adopt the rec- 51
ommendations made in the report of Clarence C. Fowler, hereinbefore referred to and marked Exhibit A, with respect to the allowance, disallowance and suspension of claims as shown in his report, the same as if here fully set forth and repeated.

VIII.—Accordingly, I recommend that a first dividend of 25% be declared and paid from the general fund to the insurance creditors and the

general creditors as more fully set forth in the report of Clarence C. Fowler, hereinbefore referred to and marked Exhibit A, and that no dividend be paid at this time from the trust fund.

IX.—From the report of Clarence C. Fowler, hereinbefore referred to and marked Exhibit A, it appears that all the administrative work necessary and required in the liquidation proceeding has been performed by the Special Deputies in charge of the liquidation respectively for the
53 periods during which they acted; that all of the legal services required in the liquidation proceeding have been performed by the Special Deputies and by attorneys employed in the Liquidation Bureau except that it has been necessary to engage the services of counsel in other states to conduct litigation in such states, and in several cases, it has been necessary to engage the services of counsel in the City of New York for conducting active litigation; that all of the clerical work in connection with the liquidation proceeding has been performed by clerks and assistants regularly employed on monthly salaries and since January
54 1, 1920, by the regular clerks and assistants of the Liquidation Bureau; that all of the work requiring technical knowledge of insurance customs, practices and accounting has been performed by examiners of the Insurance Department from time to time as required; and that the regular monthly salaries of the Special Deputies have been paid from the assets except during the time Moses J. Wright, Esq., was Chief of the Liquidation Bureau and since Clarence C. Fowler was appointed who has been Chief of the Liquida-

tion Bureau; and that the regular monthly salaries of the attorneys and clerks employed in the liquidation of the Casualty Company of America and who have been paid out of the assets of the Casualty Company of America; and the regular monthly salaries of the attorneys, assistants and clerks of the Liquidation Bureau and examiners of the Insurance Department which have been apportioned and charged against the estate of the Casualty Company of America according to the actual amount of time devoted by them to the business of the liquidation proceeding and all 56 disbursements made in the liquidation proceeding in accordance with the reports herein were necessary and the amounts thereof are, in my opinion, reasonable and proper charges and said disbursements are hereby fixed by me and certified for payment and allowance out of the funds and assets of the Casualty Company of America. Proper vouchers for all disbursements have been taken and are on file with the duplicate original report of Clarence C. Fowler, hereinbefore referred to and marked Exhibit A, in the Liquidation Bureau of the New York State Department of Insurance, 110 William Street, New York, N. 57 Y., in accordance with law. I recommend that the State of New York be reimbursed for the services of Moses J. Wright in the sum of $500.00 and for the services of Clarence C. Fowler in the sum of $4,700.00, as more fully shown in the report of Clarence C. Fowler, hereinbefore referred to and marked Exhibit A.

I recommend that the cash, if any, not required for the payment of the first dividend and claims

58 Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant.

recommended for payment in full, and expenses of liquidation be invested in Treasury Certificates of United States Government, bearing interest at not less than 5%.

WHEREFORE, I respectfully pray that an order be made and entered herein to the following effect:

(*a*) That this comprehensive audit, report and petition and the proceedings had herein and the disbursements and expenses incurred, allowed
59 and paid as therein set forth be approved and confirmed in all respects.

(*b*) That such of the unconverted assets as can be sold at a fair and reasonable price be sold and converted into cash at public or private sale in the discretion of the Superintendent of Insurance except that the stocks and bonds other than the bonds of the Blair-Cambria Coal Company be held to await an anticipated rise in the stock and bond market.

(*c*) That the Superintendent of Insurance be authorized to pay from the general fund, a dividend of 25% on all insurance and general claims
60 which are allowed and approved by the court, as more fully stated in the report of Clarence C. Fowler, Esq., hereto annexed and marked Exhibit A, except that if such allowed claims are materially increased by the Court, the proposed first dividend of 25% from the general fund be reduced to such a percentage as seems advisable to the Superintendent of Insurance.

(*d*) That the liabilities be fixed and determined as shown in the report of Clarence C. Fowler, hereinbefore referred to and marked Exhibit A.

Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant. 61

(*e*) That the cash not required for the payment of the first dividend, the claims recommended for payment in full and the expenses of liquidation be invested in Treasury Certificates of the United States Government, bearing interest at not less than 5%.

(*f*) That the Casualty Company of America forthwith be dissolved and its corporate charter forfeited and annulled.

(*g*) That your petitioner, the Superintendent of Insurance of the State of New York, have such 62 other and different relief as may be suitable in the premises.

That no previous application for the order herein asked for or for any like order or similar relief has been made to any court or judge.

Dated, Albany, New York, July 9th, 1921.

Respectfully submitted,

JESSE S. PHILLIPS,
Superintendent of Insurance of the State of New York, as liquidator of the Casualty Company of America. 63

(Verification by Jesse S. Phillips, dated July 9, 1921, annexed.)

Exhibit "A."

To Hon. JESSE S. PHILLIPS,
Superintendent of Insurance,
Albany, N. Y.

SIR:

Pursuant to your appointment, dated January

64 Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant.

1, 1920, designating me pursuant to Section 63 of the Insurance Law of the State of New York, the Special Deputy Superintendent of Insurance in the place and stead of Honorable Clarence H. Fay, forthwith to take possession of the property and liquidate the business of the Casualty Company of America, under and pursuant to the provisions of Section 63 of the Insurance Law of this State, I have to report that immediately upon said appointment, I duly took possession of the property and business of said Casualty Company
65 of America, which had been in liquidation since May 4, 1917, under the supervision, direction and control of the Superintendent of Insurance, and that I have examined into the business and affairs of said company and hereby make and file with you a full and true report of the proceedings had and taken and of such examination, verified by my oath, and comprising facts appearing upon the books, papers and documents of said company and of the liquidators thereof, which facts are found by me, and such conclusions and recommendations as are reasonably warranted from the facts herein disclosed and found.

66

ANTECEDENT REPORTS.

Several reports concerning the liquidation of the Casualty Company of America have been made to the Superintendent of Insurance from time to time by the two Special Deputies who preceded me in charge of the liquidation. Honorable Moses J. Wright, was the Special Deputy Superintendent of insurance in charge of the liquidation from the 4th day of May, 1917, to the 15th day of January, 1918. Honorable Clarence

Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant. 67

H. Fay was the Special Deputy Superintendent of Insurance from the 15th day of January, 1918, to the 1st day of January, 1920. I have been the Special Deputy Superintendent of Insurance since January 1, 1920, and am now in charge of the liquidation proceeding as provided by Section 63 of the Insurance Law.

The antecedent reports filed with the Superintendent of Insurance covered the entire period of the liquidation proceeding from its commencement on May 4th, 1917, up to and including the 68
31st day of July, 1919. This report will cover in detail the period from July 31st, 1919, up to and including May 31st, 1921, and in general, the entire proceeding from the beginning.

The antecedent reports respectively have been annexed to and made parts of reports and petitions of the Superintendent of Insurance, and filed with the Clerk of New York County, in the liquidation proceeding. These reports and petitions give in detail the history and organization of the Casualty Company of America, and show in detail the proceedings had and taken in the liquidation proceeding for the respective periods 69
covered and a repetition here of the facts shown in these reports, which are part of the record would only encumber this report with redundant matter, which is, therefore, omitted.

The report of the Superintendent of Insurance for the period from the 1st day of November, 1917, to the 31st day of July, 1919, was referred to a referee, by an order of the court made and entered the 17th day of February, 1920, and the referee has filed his report recommending that

70 Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant.

the proceedings had and taken, disbursements made and allowed, and the rules and regulations made and prescribed by the Superintendent of Insurance for the conduct of the liquidation proceeding should be approved in all respects.

Among the antecedent reports are reports recommending the allowance and disallowance of claims, which reports have been made and filed, from time to time, pursuant to Rule I of the rules and regulations prescribed for the conduct of the
71 liquidation proceeding. These reports are on claims and do not relate to the assets. The time to file claims, which was fixed in the formal notice sent to all creditors, policyholders and other persons interested, as more fully shown by the antecedent reports filed herein, has expired.

All assets which could be collected have been collected, and the status of the liquidation proceeding is such that by suspending claims which cannot be determined at this time, a first dividend can be paid on all approved claims provided a reserve of assets is made to pay a like dividend on suspended claims, if such claims are subsequently approved by the court.

72 This report being comprehensive of all proceedings taken is particularly made for the purpose of enabling the Superintendent of Insurance to present a comprehensive audit and report under Rule II of the rules hereinbefore mentioned, which provides that a comprehensive and final audit shall be made and filed by the Superintendent of Insurance, which audit shall include all of the claims allowed and adjudicated to be valid by order of the court.

Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant. 73

This report will be divided into four principal parts or headings, namely, Assets, Liabilities, Expenses of Liquidation and First Dividend. Under each principal part or heading, will appear subheadings of the different subjects comprising the principal parts into which the report is divided.

ASSETS.

The assets are composed of two parts, namely a trust fund and general fund.

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TRUST FUND.

The trust fund consists of assets which were deposited by the Casualty Company of America prior to liquidation under Insurance Laws of New York, Masachusetts, Ohio and Texas for the benefit and protection of policyholders.

GENERAL FUND.

The general fund consists of all assets which had not been deposited or set aside by the Casualty Company of America prior to liquidation for any particular purpose. 75

NEW YORK DEPOSIT.

The assets deposited with the Superintendent of Insurance of the State of New York are as follows:

5 New York State Canal Improvement Bonds
3%—1958 Par Value $250,000.
Book Value $247,500.

76 Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant.

The original deposit was made with the Superintendent of Insurance of New York by the Casualty Company of America on the 23rd day of September, 1903, pursuant to the laws under which the Casualty Company of America was organized and particularly Section 71 of Article II of Chapter 28 of the Consolidated Laws and Chapter 33 of the Laws of 1909, as amended and commonly known as the Insurance Law of the State. Said law provides in part as follows:

77 "The securities deposited pursuant to this section shall be held by the Superintendent in trust for the benefit and protection of and as security for the policy holders of the corporation."

The interest received on said bonds since the date of liquidation has been deposited in banks with general funds and has earned interest at the rate of 3%. The total amount of increment which should be deducted from the general fund and added to the trust fund is $30,000.00. This, added to the proceeds from the sale of the trust securities estimated on May 31st, 1921, to be $205,-
78 000.00, would make the total cash available for distribution from the trust fund amount to $235,-000.00.

* * * * * *

STATEMENT OF LEDGER ASSETS.

The ledger assets and property of the Casualty Company of America on the 4th day of May, 1917, together with the charges therein resulting from the acquisitions and additions and cash

Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant. 79

realized therefrom as the result of the liquidation proceedings and the assets at the close of business on the 31st day of May, 1921, are shown in Statement form as follows:

	Ledger Assets May 4, 1917	Acquisitions and Additions	Cash Receipts	Ledger Assets May 31, 1921
Real Estate	62,972.90			62,972.90
Mortgage Loans ..	340,000.00		245,000.00	95,000.00
Collateral Loans ...	308,883.42	105,968.73	167,771.01	247,081.14
Stocks & Bonds ...	1,277,784.33	1,357,400.00	857,174.52	1,778,009.81
Uncoll. Prems.	609,231.07	66,322.03	266,723.03	408,830.07
Comp. Re-ins.	53,852.86	6,835.13	60,687.98	
Excise Re-ins.	16,269.20		5,201.57	5,667.63
Unadj. Prems. Adv. to Agents	198,159.45	16,943.46	6,802.67	208,300.24
Bills Receivable	14,626.90	34,393.87	22,890.29	26,630.48
Adv. to Home Off. Exp.	1,770.07		88.64	1,681.43
Due from Agts.	25,811.19			25,811.19
Collateral Deposits..	15,527.44	250.00	14,761.90	1,015.54
Reinsurance Due on Paid Losses	28,828.84	365.38	19,460.18	9,734.04
Agts. Balance and Exchanged Cks.	41.78			41.78
Western Br. C. C. of A.	10,010.79	5,049.60	7,069.05	
Pac. Const Cas. Co...	71,418.69			71,418.69
Bonding Co. of A. ..	8,792.62			8,792.62
Protested Cks.	19.48			19.48
			$1,673,330.85	
*Rec'd in Liberty Bonds			5,400.00	
Total $3,045,099.19	$1,693,728.20	$1,678,730.85	$2,960,096.54	
Cash in office	548.12			200.00
Cash in Bank	44,761.95			135,045.18
Special Deposit (Massachusetts)	151,318.75			157,895.93
	$3,241,728.01	$1,693,728.20	$1,678,730.85	$3,253,237.85

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DISTRIBUTION OF TRUST FUND.

The assets deposited with the Superintendent of Insurance of the State of New York with the interest accumulation thereon constitute a trust fund for the benefit of the policy holders only. When this fund is distributed it should be distributed first among insurance creditors whose claims had accrued on the 4th day of May, 1917. The insurance claims exceed the amount of the trust fund; that is, the trust fund is insolvent and the
83 insurance creditors will not be paid in full from the trust fund. No part of the trust fund should be distributed to general creditors. As hereinbefore shown this fund consists of $250,000 par value of New York State Canal Improvement bonds which if sold at this time would bring only $205,000, and upon adding the interest received amounting to $30,000, the trust fund would be $235,000. This would be reduced when the pro rata part of the expenses of liquidation are deducted as hereinafter shown. The insurance liabilities allowed and suspended as hereinafter shown amount to $2,454,719.05 and the dividend
84 from the trust fund will be less than 10%. In any event before the deposit assets in possession of the Superintendent of Insurance of New York can be distributed, it will be necessary for the liquidator to procure an order as provided by Section 104 of the Insurance Law, authorizing the Superintendent of Insurance to transfer the trust assets held by him as Superintendent of Insurance to himself as liquidator. Section 104 provides that such an order may be obtained from a Special Term of the Supreme Court held with-

in the judicial district in which the principal office of the company was located or to dissolution, and upon the application of the Attorney-General after service of eight days written notice of such application upon the Superintendent of the Insurance Department. When such an order has been obtained, the bonds should be transferred and held by the liquidator for sale at a later date in a market more favorable than that now prevailing. Notice of the application which will be made by the Attorney-General will be given in the notice of the filing of the report of the Superintendent of Insurance made hereon and of the motion to confirm the report and distribute the assets. 86

DISTRIBUTION OF GENERAL FUND.

The general fund should be distributed among both insurance and general creditors whose claims had accrued when the order of liquidation was entered on May 4th, 1917, and where claims are allowed and approved, in manner following: After the trust fund had been exhausted in the distribution among insurance creditors, the general fund should be distributed pro rata among insurance creditors on the unpaid balances of their claims and among general creditors on the amounts for which their claims are allowed and approved. 87

LIABILITIES.

The time fixed in the liquidation notice for the filing of claims expired on the 15th day of August, 1917, as more fully shown from the report and pe-

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tition of the Superintendent of Insurance in the liquidation proceeding verified the 24th day of December, 1917.

Pursuant to the notice to file claims 5,606 verified proofs and notices of claim have been filed and presented.

An unusually large proportion of the claims presented had no merit whatsoever. This, in my opinion, was due to the fact that a great many claimants and attorneys believed that the proofs of claims were prima facie proof of their claims
89 the same as in bankruptcy proceedings under the Federal Bankruptcy Act and that the burden was on the liquidator to show that the claims were invalid. Proceedings to liquidate under Section 63 of the Insurance Law are new and the law governing the determination of liabilities was not well known. In many cases claimants and their attorneys when they discovered that the burden of proof was on them to establish by competent evidence the validity of their claims withdrew their claims or allowed them to be dismissed without presenting any evidence to establish the assertions made in their verified proofs. Many
90 claims of little or no merit were filed solely for the purpose of securing settlements by way of compromise. The labor, expense and time required to investigate and determine the merits of such claims and to prepare them for trial is the same as that required to investigate and determine the validity and value of meritorious claims. In many cases the claimants and attorneys having claims possessing no merits refused to withdraw such claims until confronted

by a referee and the necessity of producing competent evidence to establish the statements made in their verified proofs. Claimants failing to secure from the liquidator settlements for nominal amounts would default or withdraw their claims in order to avoid the payment of costs. The investigation and determination of so many claims having no merit is not only expensive, but retards a liquidation proceeding and unduly delays distribution of the assets.

If the insuring public, insurance agents, brokers and members of the legal profession would refrain from presenting claims possessing no merit, 92 liquidation proceedings under Section 63 of the Insurance Law would be facilitated and the expenses of liquidation lowered. The assets of delinquent insurance companies would be more quickly distributed to their rightful owners and placed in circulation.

The filing of a claim possessing no merits and attempting to collect upon it constitutes a rapacious raid upon the assets of a company in liquidation. Every inflated, dishonest, fraudulent and unjust insurance claim collected is a reward for dishonesty and a tax upon the creditors of an 93 insolvent insurance company because such claims must be resisted by the liquidator at an expense to the creditors holding meritorious claims. All of such claims have been resisted by the liquidator and many of them have been dismissed by the referees and the court. Others are pending undetermined.

In the case of the Casualty Company of America, 5,606 claims have been presented by which the aggregate amount claimed is $14,900,471.20.

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Of these claims aggregating $12,131,476.58 have been disallowed and many others in the suspended list will be disallowed before the proceeding is closed. Up to the present time, the liquidation of the Casualty Company of America, 81% of the claims filed have been declared to be invalid. In the liquidation of the Empire State Surety Company the total claims filed amounted to $2,240,627.80 of which $1,370,868.13 or 61% have been disallowed, and others pending before referees
95 are likely to be dismissed.

In determining and fixing the liabilities of the Casualty Company of America the liquidator, appreciating the fact that many claims possessing no merit had been filed, has experienced much trouble and anxiety for fear of doing injustice and in order to avoid disallowance of any meritorious claim, he has given claimants the fullest latitude to present all facts which might show the validity of their claims and has heard all claimants who desired to be heard in support of their claims.

The claims and liabilities have been fixed and determined as of the 4th day of May, 1917, except
96 compensation claims, the treatment of which is hereinafter more fully described. Several claims have been held by the court to be contingent claims against the assets in possession of the liquidator, but valid against the surplus assets remaining after all debts and liabilities which had accrued on May 4th, 1917, are paid and discharged in full from the assets in possession of the liquidator. These decisions are based upon the case of *Matter of Metropolitan Surety Company,* 205

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N. Y., 135. No effort has been made to fix or determine the contingent claims or the debts or liabilities which have accrued since May 4th, 1917. These liabilities are contingent and are entitled to share only in the surplus assets remaining after the payment of all debts and liabilities which had accrued when the order of liquidation was entered on May 4th, 1917. *Matter of Metropolitan Surety Company,* 205 N. Y., 135; *Matter of Empire State Surety Company,* 216 N. Y., 273. If, in the future, it appears that the assets are sufficient to pay all of the debts and liabilities 98 which had accrued when the order of liquidation was entered, the contingent liabilities will be then fixed and determined and a report thereon made to the court.

Classification of Liabilities.

The liabilities are composed of two classes.

1. The claims predicated on bonds or contracts of insurance or reinsurance issued by the Casualty Company of America prior to May 4th, 1917, are "Insurance Liabilities."

2. The claims not predicated upon bonds or 99 contracts of insurance or reinsurance are "General Liabilities." In other words, all claims other than insurance claims are "General Liabilities."

List of Liabilities.

Exhibits "C", "D" and "E" hereto annexed and made a part hereof contain a complete list of all claims filed or presented in the liquidation proceeding and of all liabilities known to exist.

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Exhibit C contains a list of all allowed claims.
Exhibit D contains a list of all disallowed claims.
Exhibit E contains a list of all suspended claims.

The "Insurance Liabilities" are contained in the lists marked a, b, c, d, e, f, g, h, and i of Schedules I and II of each Exhibit.

The "General Liabilities" are contained in the lists marked j, k, l, m, n and o of Schedules I and II of each Exhibit.

Schedule I of each Exhibit contains the claims
101 which have been the subject of a decision by the Court at one time or another in the liquidation proceeding, that is, allowed, disallowed or referred.

Schedule II of each Exhibit contains the claims which have been the subject of action by the Superintendent of Insurance only and these claims have not been before the court for any adjudication by the court.

CONDENSED RECAPITULATION OF LIABILITIES.

	Exhibit C Allowed	Exhibit D Disallowed	Exhibit E Suspended
1. INSURANCE:			
Schedule I, a-i	$276,503.09	$9,718,085.54	$1,049,534.19
102 Schedule II, a-i	410,392.64	2,191,712.75	718,289.13
Total Insurance Claims	$686,895.73	$11,909,798.29	$1,767,823.32
2. GENERAL:			
Schedule I, j-o	$2,660.79	$80,031.40	$15,639.42
Schedule II, j-o	268,438.08	141,646.89	27,537.28
Total General Claims	271,098.87	221,678.29	43,176.70
Total Claims	$957,994.60	$12,131,476.58	$1,811,000.72
Total claims presented 5,606, amounting to			$14,900,471.20

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A comprehensive recapitulation of liabilities showing each class and kind of liability, the amounts claimed, allowed, disallowed and suspended precedes the Exhibits C, D and E hereto annexed and hereinbefore more fully described.

ALLOWED CLAIMS.

In Exhibit C is shown in the first column the name and address or last known address of each claimant to whom the claim is payable or the attorney for the claimant if represented by counsel 104 and the number assigned to the claim in the liquidation proceeding. In the next and succeeding columns is shown the amount of liability, the amount claimed and in the last column is shown the amount at which the claim is allowed except the compensation claims shown in lists "c" of schedules I and II of Exhibit C.

* * * * * *

UNPAID PREMIUMS TO BE DEDUCTED FROM DIVIDENDS.

In many cases of allowed insurance claims the premiums on the policies or contracts on which the claims are predicated have not been paid. 105 The unpaid premiums should be deducted from the first dividend. In each case in which the first dividend is not sufficient to pay the unpaid premiums the dividend will be applied towards payment of the premiums and the creditor will remain liable for the balance.

DISALLOWED CLAIMS.

The claims set forth in Exhibit D are such that

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I cannot recommend them for allowance. These claims I recommend for disallowance and dismissal.

* * * * * *

CLAIMS OF STOCKHOLDERS.

The claims of stockholders of the Casualty Company of America have not been investigated or determined. If, in the future, it develops that the assets are sufficient to pay all creditors in full, including the contingent claims, and a surplus
107 will remain for distribution to stockholders, the claims of stockholders will at that time be fixed and determined and a report thereon made to the court fixing their rights and liabilities.

PRIORITY OF CLAIMS.

The expenses of liquidation are preferred over all claims and should be paid first and in full from both the trust and general funds in the proportions hereinafter specified and before any distribution is made to creditors. The claim of the State of New York for the fees and expenses of examiners of the Insurance Department for ex-
108 amining into the affairs of the Casualty Company of America prior to liquidation, amounting to $3,151.04 and set forth in list "o" Schedule "II" of Exhibit "C" hereto annexed, is entitled to the same status as an expense of the liquidation proceeding, and should be paid from both the trust and general funds in the same manner and proportions that the expenses of liquidation are paid from the two funds as hereinafter specified. In re Traders & Travelers Accident Co., 68 Misc., 440.

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PRIORITY OF INSURANCE CLAIMS.

The insurance claims are preferred over all other claims in that part of the trust fund remaining after payment of expenses of liquidation, and the remainder of the trust fund should be distributed pro rata to insurance creditors, whose claims had accrued when the liquidation order was entered in May 4th, 1917, at the amounts for which such claims are allowed. No insurance claim is entitled to any preference or priority over any other insurance claim. The insurance claims 110
of the United States of America and the State of New York are not entitled to preference or priority over any other insurance claim in the trust fund. The insurance claims of the United States of America and the State of New York are entitled to share pro rata with other insurance claims in the trust fund without prejudice to whatever claim, if any, exists for a preference for the unpaid balances of such claims remaining unpaid after distribution of the trust fund. Whether such a preference exists will be considered when all of the claims of the United States of America and the State of New York
are fixed and determined and the amounts of the 111
unpaid balances thereof are fixed by application or distribution of the trust fund.

At this time it appears that the general fund will be sufficient to pay in full all balances of insurance claims of the United States of America and the State of New York remaining unpaid after application of the trust fund. Therefore, it is not necessary to determine whether any priority exists between claims of the United States of

America and the State of New York in the general fund.

PRIORITY OF GENERAL CLAIMS.

The general claims are not entitled to share in the trust fund for the reason hereinbefore more fully stated under the heading "ASSETS", subheading "Distribution of Assets".

The general claims which had accrued when the liquidation order was entered on May 4th, 1917, are entitled to share pro rata in the general
113 assets, at the amounts for which such claims are allowed and approved by the court herein with the insurance claims on the unpaid balances of the insurance claims remaining after distribution as aforesaid of the trust fund among insurance creditors.

CONTINGENT CLAIMS.

The contingent claims, that is, those claims which accrued subsequently to the entry of the order of liquidation, are not entitled to share until all debts which had accrued when the order of liquidation was entered are paid in full. These claims have not been fixed or determined as here-
114 inbefore stated. The labor and expense of determining these claims will not be incurred until it appears as a matter of fact that all debts existing on May 4th, 1917, are or can be paid in full.

* * * * * *

FIRST DIVIDEND FROM TRUST FUND.

I recommend that no dividend be paid from the trust fund at this time because of the loss which would result if the trust securities are sold in

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the low market now prevailing. If a dividend is paid at this time the claims which are referred, if any, by the order of the court to be entered hereon should be considered as allowed when computing the dividend. In other words, the first dividend from the trust fund should be computed on the total amount of allowed and suspended insurance claims and if any disallowed claims are referred or allowed they should be added to that, if such claims are allowed in the future a reserve of assets will remain for payment of the first dividend on such claims. 116

A dividend of 5% on the aggregate amount of insurance claims allowed and suspended would disburse $122,735.95 of the trust fund. This amount should be increased in the ratio that disallowed claims are referred. If the referred insurance claims materially increase the amount of claims on which the first dividend is to be computed, the rate of dividend proposed should be reduced so that sufficient assets will remain for the payment of further expenses of liquidation chargeable to the trust fund.

If a dividend is paid at this time I recommend that a like dividend be paid from time to time on 117 suspended and referred claims as they are approved respectively by orders of the court upon applications respecting specific claims made in accordance with the practice which has governed the settlement, compromise and allowance of claims separately. The first dividend from the trust should be paid to the persons whose names are set forth under the column entitled "Claimants" in Exhibit C hereto annexed and made part

hereof, upon the amounts at which such claims respectively have been allowed and approved as set forth under the column entitled "Amount Allowed" in said Exhibit C. The dividends on suspended and referred claims when approved by the court should be paid to the persons and on the amounts specified in the respective orders of the court allowing and approving such claims.

FIRST DIVIDEND FROM GENERAL FUND.

119 For the purpose of computing and paying a first dividend from the general fund the general claims which are allowed and suspended together with the general claims, if any, which are referred by order of the court to be entered hereon should be added to 90% of the amounts of the insurance claims allowed, suspended and referred and the first dividend computed on the total amount thus obtained. The general claims allowed and suspended amount to $314,275.57, ninety per centum of the insurance allowed and suspended is $2,209,247.15, making a total of $2,523,522.72 on which a dividend of 25% would disburse
120 $630,880.68 of the general fund.

If the referred, general or insurance claims materially increase the aforesaid amount of claims on which the proposed dividend is computed, the rate of the first dividend proposed should be reduced proportionately in order to maintain the same reserve of assets allowed in the computation of the dividend of 25%.

I recommend that a first dividend of 25% be declared and paid from the General Fund on the insurance and general claims which have been

allowed, and from time to time, as suspended and referred claims are adjudicated to be valid and become approved by orders of the court upon applications respecting specific claims made in accordance with the practice which has governed the settlement, compromise and allowance of claims separately that a like dividend be paid on such claims. The first dividend should be paid to the persons whose names are set forth under the column entitled "Claimant" in Exhibit C hereto annexed and made part hereof, upon the amounts at which such claims respectively have 122
been allowed and approved as set forth under the column entitled "Amount Allowed" in said Exhibit C. The dividends on suspended and referred claims when approved by the court should be paid to the persons and on the amounts specified in the respective orders of the court allowing and approving such claims.

* * * * * *

DISSOLUTION OF THE CASUALTY COMPANY OF AMERICA.

Title to all property of the Casualty Company of America vested in the Superintendent of In- 123
surance of the State of New York, by operation of law, by the entry of the order directing the liquidation. Hartigan & Dwyer vs. Casualty Company of America, 227 N. Y., 175. Thereby, the Casualty Company of America was divested of title to all of its property. An application for dissolution of the Company was made by the Superintendent of Insurance at Special Term of the Supreme Court on notice. This application was opposed by one or two stockholders and the

motion was referred to a referee but no order has been entered to that effect. The stockholders on that application represented that they were endeavoring to rehabilitate the Company. Nothing has been done by the stockholders of a substantial character. No money has been advanced, and apparently the efforts which the stockholders on the aforesaid motion claimed to have made have not produced any substantial result. Nothing is to be accomplished by allowing the corporate charter to remain in existence while the
125 dissolution of the corporation would protect the great majority of stockholders and creditors entitled to share in the surplus assets, if any remain, after all debts established and allowed in the liquidation proceeding are paid, since, in the proceeding to distribute the surplus assets, if any remain, litigation as to whether or not full faith and credit should be given to judgments obtained in foreign states after the entry of the order of liquidation will be eliminated and further, the Superintendent of Insurance would be relieved of the necessity of determining whether or not to incur expense in defending such litigation in
126 foreign states so that no rights would be lost in the event it should be later determined that such judgments are valid and entitled to full faith and credit under the Federal Constitution.

CONCLUSIONS.

I recommend that the Superintendent of Insurance petition the Court for an order approving and confirming the proceedings had and taken herein and the expense paid and incurred; authorizing the payment of a maximum first dividend

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from the general but none from the trust fund at this time; fixing and determining the assets and liabilities of the Casualty Company of America, its creditors, stockholders and all other persons interested; authorizing the investment of the cash not required for the payment of claims and the expense of liquidation, in United States Treasury Certificates; dissolving the Casualty Company of America; and for such other and further relief as may seem proper and just to the court in the premises.

Dated, New York, N. Y., July 8th, 1921. 128

Respectfully submitted,

CLARENCE C. FOWLER,
Special Deputy Superintendent of Insurance of the State of New York.

STATE OF NEW YORK,
County of New York, } ss.:

CLARENCE C. FOWLER, being duly sworn, deposes and says that the foregoing report by him subscribed is true to the best of his knowledge and information, as he verily believes. 129

CLARENCE C. FOWLER.

Subscribed and sworn to before me
this 8th day of July, 1921.
FLORENCE W. DOUGHERTY,
Notary Public.
Kings County Clerk No. 376.
Kings County Register No.
New York County Clerk No. 267.
New York County Register No. 3293.

* * * * * *

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RECAPITULATION OF LIABILITIES

1. INSURANCE CLAIMS

Class of Claims	Schedules	Exhibit C Allowed	Exhibit D Disallowed	Exhibit E Suspended	Total Claims Filed
a. Accident and Health	I	$3,100.00	$21,422.41	$13,129.72	$37,652.13
	II	2,992.88	2,967.94	1,395.05	7,355.87
b. Burglary	I	1,303.37	2,816.90		4,120.27
	II	1,250.00	513.97	642.00	2,405.97
c. Compensation	I		1,989.68	1,811.79	3,801.47
	II	232,581.34	295,227.80	337,305.68	865,114.82
d. Excise	I		16,025.00		16,025.00
	II		23,225.00		23,225.00
e. Industrial	I	1,762.66	2,456.66		4,219.32
	II	6,240.99	11,422.63	4,755.30	22,418.92
131 f. Liability	I	209,472.29	1,447,049.54	549,306.55	2,205,828.38
	II	147,821.07	713,085.36	320,045.50	1,180,951.93
g. Plate Glass	I				
	II	7,265.51	5,385.93	4,546.00	17,197.44
h. Return Premiums	I	4,361.37	2,801.82		7,163.19
	II	10,780.14	9,318.40	1,480.14	21,578.68
i. Surety					
1. Contract	I	56,233.40	7,825,686.97	278,321.13	8,160,241.50
	II	1,275.35	1,075,265.61	27,975.68	1,104,516.64
2. Court	I	250.00	102,923.85	3,475.00	106,648.85
	II	151.13		20,143.78	20,294.91
3. Fidelity	I	20.00	63,678.95		63,698.95
	II		1,833.30		1,833.30
4. State and U. S.	I		231,233.76	203,490.00	434,723.76
	II	34.23	53,466.81		53,501.04
Total Insurance Claims		$686,895.73	$11,909,798.29	$1,767,823.32	$14,364,517.34

2. GENERAL CLAIMS

132 j. Attorney	I		450.00	1,158.31	1,608.31
	II	42,994.45	22,254.67	17,567.48	82,816.60
k. Medical	I				
	II	5,377.37	5,509.06	8,537.40	19,423.83
l. Miscellaneous	I	2,599.93	36,584.69	5,991.34	45,175.96
	II	207,088.31	10,142.29	448.56	217,679.16
m. Premiums	I	60.86	93,629.71		93,690.57
	II	1,669.70	17,375.06	983.84	20,028.60
n. Taxes	I		10,982.49	8,489.77	19,472.26
	II	8,157.21	24,750.32		32,907.53
o. Preferred	I				
	II	3,151.04			3,151.04
Total General Claims		271,098.87	221,678.29	43,176.70	535,953.86
" Insurance "		686,895.73	11,909,798.29	1,767,823.32	14,364,517.34
		$957,994.60	$12,131,476.58	$1,811,000.02	$14,900,471.20

Total number of Claims Presented—5,606.

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Exhibit D—Schedule I.

INSURANCE CLAIMS

SURETY CLAIMS ON CONTRACT BONDS DISALLOWED AND APPROVED BY ORDERS OF THE COURT.

Claimant, Attorney and Address	Principal	Amount of Bond	Amount Claimed and Disallowed
Southwestern Bell Telephone Co., c/o C. C. English, Boatmens Bank Bldg., St. Louis, Mo. No. 679	American Contracting Co., ...	$500.00	$104.69
Kinloch Telephone Co., Kinloch Bldg., St. Louis, Mo. No. 360	Behr Electrical Contracting Co.	6,467.00	14.75
Southern Surety Co., Title Guaranty Bldg., St. Louis, Mo. No. 274	Sidney Bieber	25,000.00	25,000.00
Title Guaranty & Surety Company, Scranton, Pa. No. 10	Reinsurance		7,497,579.10
Confer, C. P., c/o Harry B. Saussaman, 222 Market Street, Harrisburg, Pa. No. 547—b			123.87
Eichleay, Jr., Co., John South 20th & Wharton Sts., Pittsburgh, Pa. No. 547—c			324.64
Flynt Granite Co., W. N., c/o Paul B. Cromelin, Riggs Bldg., Washington, D. C. No. 547—d			1,300.00
	H. L. Brown Co. ..	28,400.00	
Humbert, W. C., c/o Harry B. Saussaman, 222 Market Street, Harrisburg, Pa. No. 547—e			177.95
Lightner, A. W., c/o Harry B. Saussaman, 222 Market Street, Harrisburg, Pa. No. 547—f			128.87
Perry Brothers, c/o Louis H. Porter, 140 Nassau Street, New York City No. 547—g			2,051.71
Barlow, H. Z.,	J. W. Bryan	1,250.00	451.52

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Claimant, Attorney and Address	Principal	Amount of Bond	Amount Claimed and Disallowed
c/o Claude N. McCallun, 494-5 Scollard Bldg., Dallas, Texas No. 545			
National Surety Co., c/o Wm. J. Griffin, 115 Broadway, New York City No. 627	Joseph Canepi Contracting Co., Inc. ..	39,276.35	Contingent
Bliss Company, E. W., c/o Platt & Field, 120 Broadway, New York City No. 487	C. C. Electric & Mfg. Co.	15,000.00	15,000.00
137 Foley, John J., c/o Weissberger & Leichter, 93-99 Nassau Street, New York City No. 600—a			332.24
Mt. Vernon Builders Supply Company, c/o Holden & Cavanaugh, First Nat'l Bank Bldg., Mt. Vernon, N. Y. No. 600—b	Joseph di Benedetto	22,050.00	333.39
International Fidelity Insurance Company, 15 Exchange Place, Jersey City, N. J. No. 271	Joseph di Benedetto	13,000.00	84.43
Mulhern, John, c/o D. C. Murphy, Mutual Bank Bldg., San Francisco, Calif. No. 622	John F. Dowling ...	800.00	771.83
138 England, Harrison L., Rockville, Md. No. 526	Charles T. Eastburn Co.	11,860.40	121.77
Southern Surety Co., Title Guaranty Bldg., St. Louis, Mo. No. 644	P. Flanigan & Sons..	22,871.54	22,871.54
Tiffany Studios, c/o DeForest Bros., 30 Broad Street, New York City No. 299—a	Charles Gilpin	42,300.00	3,140.00
W. C. Bauman Lumber Company, F. J. Bates, Agent, c/o R. S. Wells, Paris, Texas No. 546	S. A. Harper	1,692.00	156.60
Bailey, Jason S., c/o Hirsh, Newman & Reass,	Hartman Wrecking Co., Inc.	10,000.00	4,698.13

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Claimant, Attorney and Address	Principal	Amount of Bond	Amount Claimed and Disallowed
391 Fulton Street, Brooklyn, N. Y. No. 251			
Bennett, Fred S., Attorney in Fact for Noel Jourda De Vaux, c/o Franklin Bein, 5 Beekman Street, New York City No. 291	John T. Hettrick Charles G. Armstrong & David L. Herman	50,000.00	29,000.00
Frederick Fatzler Company, c/o Saul Cohen, 790 Broad Street, Newark, N. J. No. 556	Imperial Water Proof Co.	4,000.00	1,000.00
Board of Education of Newark, in the County of Essex, c/o Charles M. Myers, 920 Broad Street, Newark, N. J. No. 625	Imperial Water Proof Co.	1,000.00	1,000.00
Board of Education of Newark, in the County of Essex, c/o Charles M. Myers, 920 Broad Street, Newark, N. J. No. 626	Imperial Water Proof Co.	1,000.00	1,000.00
Acme Cement Plaster Company, Olive & 9th Streets, St. Louis, Mo. No. 508—a	Innis & McGraw	7,162.50	175.00
Doughty, I. R., c/o W. W. Hilbrant, Dallas, Texas No. 508—b			166.83
Johns-Manville Co., H. W., Madison Ave. & 41st Street, New York City No. 508—c			76.95
Klein Bros. Company, Dallas, Texas No. 508—d	Innis & McGraw	7,162.50	54.20
Pratt Paint & Paper Co., Dallas, Texas No. 508—e			89.05
West Dallas Gravel & Sand Company, 830 Wilson Bldg., Dallas, Texas No. 508—f			215.60
Hayden, A. D., c/o W. W. Hilbrant, Dallas, Texas No. 509—a			580.30
Lingo Lumber Co., Dallas, Texas No. 509—c	Innis & McGraw	4,025.00	27.50

142 Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant.

	Claimant, Attorney and Address	Principal	Amount of Bond	Amount Claimed and Disallowed
	Mayfield Lumber Co., J. S., c/o M. Murphy, Gen'l Agent, 1102 Southwestern Bldg., Dallas, Texas No. 509—d			196.02
	International Fidelity Insurance Company, 15 Exchange Place, Jersey City, N. J. No. 216—a			415.22
	Metropolitan Flour Mill & Grain Co., c/o Simpson, Thacher & Bartlett,	Johnston, Cramor & Sprague	10,000.00	11,409.33 with int.
143	62 Cedar Street, New York City No. 216—b			
	DeKalb Company, c/o Owens, Gray & Tomlins, 189 Montague Street, Brooklyn, N. Y. No. 463	Wm. H. Kemble	30,000,00	27,500.00
	Brick Terra Cotta & Tile Co., Assigned to Eugene F. Ford, c/o T. C. Ennever, 132 Nassau Street, New York City E. J. Dowling, 233 Broadway, New York City No. 657	P. F. Kenny Co.	67,025.00	1,253.05
	Concord Construction Co., 476 Seneca Avenue, Brooklyn, N. Y. No. 605	J. M. Knopp	4,579.50	172.00
144	Southern Surety Co., Title Guaranty Bldg., St. Louis, Mo. No. 630	Louisiana Contracting Company	13,000.00	13,000.00
	Johns-Manville Co., H. W., Securities Bldg., Seattle, Wash. No. 615—b			62.18
	Seattle Paint Co., 224 Jackson Street, Seattle, Wash. No. 615—c			10.13
	Washington Sheet Metal Works, Inc., 1913-17 - 7th Ave., Seattle, Wash. No. 615—d	Musgrave & Blake ..	28,149.00	256.76
	Acme Cement Plaster Co., Olive & 9th Streets, St. Louis, Mo. No. 550—a			131.25
	Enochs Lumber & Mfg. Co., c/o J. E. Carter, Weatherford, Texas	Meville & Graham ..	4,876.25	624.78

Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant. 145

Claimant, Attorney and Address	Principal	Amount of Bond	Amount Claimed and Disallowed	
Milmo Lumber Co., c/o J. E. Carter, Weatherford, Texas No. 550—c			164.75	
Wolfson, A. L. & S., 30 Church Street, New York City No. 275	New York Tin & Tar Roofing Co.	35.00	35.00	
William A. Sexton Company, Inc., c/o Samuel E. Darby, 220 Broadway, New York City No. 603	Patent Tile & Protective Co.	5,000.00	5,000.00	
Kane Co., John P., c/o Thomas & Houghton, 111 Broadway, New York City No. 616	James P. Rice	5,000.00	3,040.41 with int.	146
Southern Surety Co., Title Guaranty Bldg., St. Louis, Mo. No. 650	Chas. A. & Adam Sauer	53,482.60	53,482.60	
Southern Gypsum Co., Inc., c/o Brenizer & Black, Bryant Bldg., Charlotte, N. C. No. 573—a			1,252.19	
Southern Surety Co., Title Guaranty Bldg., St. Louis, Mo. No. 573—b	John G. Unkefer Co.	50,000.00	50,000.00	
Tennessee Producers Marble Co., Knoxville, Tenn. No. 573—c			7,794.97	
Baum Safe & Lock Company, The J., c/o J. Sagmeister, 1009 Traction Bldg., Cincinnati, Ohio No. 573—d			742.31	147
Berry Brothers, Detroit, Mich. No. 573—e			70.00	
Ryers Machine Co., The John F., c/o Pomerene, Ambler & Pomerene, 631 Renkert Bldg., Canton, Ohio No. 573—f	John G. Unkefer Co.	50,000.00	164.65	
Charlotte National Bank, c/o Pharr & Bell, Charlotte, N. C. No. 573—g			1,343.21	
Fischer & Jirouch Company, The c/o Friebelin & Byers,			1,140.93	

148 Report of Jesse S. Phillips, Superintendent of Insurance, Disallowing Claim of Claimant.

	Claimant, Attorney and Address	Principal	Amount of Bond	Amount Claimed and Disallowed
	613 American Trust Bldg., Cleveland, Ohio No. 573—h			
	Grabler Mfg. Co., The, Cleveland, Ohio No. 573—i			23.62
	Guilford Lumber Manufacturing Co., c/o Charles A. Hines, Greensboro, N. C. No. 573—j			1,885.53 with. int.
	Harris Granite Quarries Co., c/o Craige & Craige, Salisbury, N. C. No. 573—k			45.03
149	McCausland & Co., J. N., 221 South Tyron St., Charlotte, N. C. No. 573—l	John G. Unkefer & Co.	50,000.00	142.67
	McKenna Brass & Manufacturing Co., Inc., First Ave. & Ross St., Pittsburgh, Pa. No. 573—m			73.86
	Matot, D. A., 1546 Montana Street, Chicago, Ill. No. 573—n			95.00
	National Lead & Oil Co., c/o Warren E. Russell, Massillon, Ohio No. 573—o			322.50
	Piedmont &NorthernRailway Company, c/o W. S. O'B. Robinson, Jr., Charlotte, N. C. No. 573—p			712.41
150	Ray & Co., G. G., c/o A. B. Justice, 112-116 Lawyers Bldg., Charlotte, N. C. No. 573—q			332.94
	Rogers-Shear Co., The, Warren, Pa. No. 573—r			9.89
	Rowe Cut Stone Company, John A., c/o Bynum E. Hinton, Munsey Bldg., Washington, D. C. No. 573—s	John G. Unkefer & Co.	50,000.00	3,582.65
	Scott & Co., John M., Charlotte, N. C., No. 573—t			1.20
	Smith-Wadsworth Hdw. Co., Charlotte, N. C. No. 573—u			18.20
	Southern Electric Co., c/o Pomerene, Ambler & Pomerene, Canton, Ohio			203.18

Notice of Motion to Confirm Report of Liquidator. 151

SUPREME COURT,

NEW YORK COUNTY.

In the Matter *of* The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.	County Clerk's Number 15434-1917. 152

PLEASE TAKE NOTICE, that the comprehensive and final audit and report by the undersigned, as liquidator of the Casualty Company of America, duly verified the 9th day of July, 1921, was this day filed in the office of the Clerk of the County of New York, and duplicate original thereof, with vouchers, in the office of the Liquidation Bureau of the Insurance Department of the State of New York, at 110 William Street, Borough of Manhattan, City of New York. 153

PLEASE TAKE FURTHER NOTICE, that said comprehensive and final audit and report will be presented to the Supreme Court of New York at a Special Term, Part I thereof, for motions, to be held at the New York County Court House in the Borough of Manhattan, City of New York, on

154 Notice of Motion to Confirm Report of Liquidator.

the 12th day of August, 1921, at 10:15 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, and a motion will then and there be made thereon for an order and judgment approving and confirming said comprehensive and final audit and report, the proceedings had, the cash receipts amounting to $1,678,730.85, the expenses incurred, paid and allowed herein as therein set forth amounting to $255,592.88; fixing and determining the claims against and liabilities of said Casualty Company of America as in said comprehensive and final audit and
155 report allowed, disallowed or suspended; directing the dismissal of claims which have been disallowed; directing that such of the unconverted assets as can be sold at this time at their fair and reasonable market values be sold and converted into cash by the Superintendent of Insurance at private or public sale for the best prices obtainable in the discretion of the Superintendent of Insurance, except that the stock and bonds other than the bonds of the Blair-Cambria Coal Company be held to await an anticipated rise in the stock and bond market and then to be sold in the discretion of the Superintendent of
156 Insurance at private or public sale for the best prices obtainable; adjudging and decreeing that claimants whose claims are based on bonds or contracts of insurance or reinsurance are insurance creditors and are entitled to share pro rata among themselves the deposit securities, and on the unpaid balances of their claims to share pro rata with general creditors in the general fund: adjudging and decreeing that claimants whose claims are not based on bonds or contracts of insurance or reinsurance, are general creditors and

are entitled to share only in the general fund; directing that when the deposit securities are transferred to the undersigned as liquidator under the provisions of Section 104 of the Insurance Law, they be held to await sale in a better market than that now prevailing and that no dividend be paid from the trust fund at this time; directing that a first dividend of 25% be paid from the general fund to each insurance and general creditor whose claim has been or is hereafter allowed and approved by order of the court; that the first dividend from the general fund be computed and paid upon 90% of the amount at which each insurance claim is allowed and approved and upon the whole amount at which each general claim is allowed and approved by order of the court, and that a like dividend be paid on all claims that are suspended or referred, and that from time to time as suspended claims are adjusted and approved respectively by orders of the court herein that a like dividend be paid from the general fund on such claims; adjudging and decreeing that the Casualty Company of America, its estate and the Superintendent of Insurance be released and their liabilities terminated as to the amounts distributed herein; that the Casualty Company of America be dissolved and its corporate charter forfeited and annulled, and granting such other, further and different relief as may seem just and equitable to the court in the premises.

PLEASE TAKE FURTHER NOTICE that at the aforesaid time and place the Attorney-General of the State of New York will make an application to the Court, pursuant to Section 104 of the Insurance Law of the State of New York, for an order

160 Notice of Motion to Confirm Report of Liquidator.

authorizing, directing and permitting the undersigned to transfer to himself as liquidator in the above-entitled proceeding, all funds deposited by the Casualty Company of America with the Superintendent of Insurance of the State of New York, prior to liquidation for the benefit of policyholders and that said funds will be distributed in the above-entitled liquidation proceeding in accordance with the directions of the court.

Please Take Further Notice that all creditors of the Casualty Company of America and all
161 persons having any unsatisfied claim or demand of any character against the Casualty Company of America, or its liquidator, and all persons holding any open or subsisting contract of such corporation who have not heretofore filed claim, are hereby required to file with and deliver and present the same in writing and in detail, duly verified under oath, to Clarence C. Fowler, as Special Deputy Superintendent of Insurance in charge of the liquidation of said corporation at his office, 110 William Street, Borough of Manhattan, New York City, on or before the 2nd day of August, 1921.

162 Please Take Further Notice, that pursuant to Rule I of the rules prescribed by the liquidator any claimant who shall object to the disallowance or other disposition made of his claim or who has any other objection to make shall at least ten days prior to the return date hereinbefore set in this notice, file with the Superintendent of Insurance and the New York County Clerk, a plain and concise statement in writing, duly verified, setting forth the facts constituting his claim and objections.

Notice of Motion to Confirm Report of Liquidator. 163

PLEASE TAKE FURTHER NOTICE that it will not be necessary for creditors whose claims are suspended to file objections in order to preserve their rights. All suspended claims will be referred to a referee and if not fixed, determined or adjusted at a later date, the same will be brought on for hearing before the referee upon due and ample notice to claimants or their attorneys respectively.

PLEASE TAKE FURTHER NOTICE that the following is a statement of the condition of the estate of the Casualty Company of America on the 31st day of May, 1921, as shown in said comprehensive audit, report and petition of the undersigned: 164

ASSETS:

	May 4, 1917	Acquisitions and Additions	Cash receipts	Assets May 31, 1921
Real Estate	62,972.90	.....	.....	62,972.90
Mortgage Loans ...	340,000.00	.....	245,000.00	95,000.00
Collateral Loans ..	308,883.42	105,968.73	167,771.01	247,081.14
Stocks and Bonds ..	1,277,784.33	1,357,400.00	857,174.52	1,778,009.81
Premiums due	609,231.07	66,322.03	266,723.03	408,830.07
Reinsurance Premiums	70,122.06	6,835.13	71,289.56	5,667.63
Unadjusted Premiums	198,159.45	16,943.46	6,802.67	208,300.24
Bills Receivable ...	14,626.90	34,593.87	22,590.29	26,630.48
Collateral Deposits .	15,527.44	250.00	14,761.90	1,015.54
Miscellaneous	147,791.62	5,414.98	26,617.87	126,588.73
Cash	45,310.07	.....	.....	135,245.18
Massachusetts Deposit	151,318.75	.....	.....	157,895.93
	$3,241,728.01	$1,593,728.20	$1,678,730.85	$3,253,237.65

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The Trust Fund consisting of $250,000.00 par value of New York State Barge Canal 3% bonds due 1958 deposited with the Superintendent of Insurance of the State of New York and the increment thereon is included in the foregoing assets.

166 Notice of Motion to Confirm Report of Liquidator.

LIABILITIES:

1. *Insurance:*	Allowed	Disallowed	Suspended	Total
Accident and Health	6,092.88	24,390.35	14,524.77	45,008.00
Burglary	2,553.37	3,330.87	642.00	6,526.24
Compensation ..	232,581.34	297,217.48	339,117.47	868,916.29
Excise	.....	39,250.00	.....	39,250.00
Industrial	8,003.65	13,879.29	4,755.30	26,638.24
Liability	357,293.36	2,160,134.90	869,352.05	3,386,780.31
Plate Glass ...	7,265.51	5,385.93	4,546.00	17,197.44
Return Premium	15,141.51	12,120.22	1,480.14	28,741.87
Surety	57,964.11	9,354,089.25	533,405.59	9,945,458.95
Total Insurance Claims	$686,895.73	$11,909,798.29	$1,767,823.32	$14,364,517.34

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2. *General:*				
Attorney	42,994.45	22,704.67	18,725.79	84,424.91
Medical	5,377.37	5,509.06	8,537.40	19,423.83
Miscellaneous .	209,688.24	46,726.98	6,439.90	262,855.12
Premiums	1,730.56	111,004.77	983.84	113,719.17
Taxes	8,157.21	35,732.81	8,489.77	52,379.79
Preferred	3,151.04	.....	.....	3,151.04
Total General Liabilities	$271,098.87	$221,678.29	$43,176.70	$535,953.86
Total Insurance Liabilities	686,895.73	11,909,798.29	1,767,823.32	14,364,517.34
Total Liabilities	$957,994.60	$12,131,476.58	$1,811,000.02	$14,900,471.20

Total claims presented 5606.

168 PLEASE TAKE FURTHER NOTICE, that the claims presented against the Casualty Company of America will be determined, its assets distributed, and its creditors, policyholders and stockholders paid, without further notice to persons failing to comply with the foregoing directions, and all persons who fail to comply with this notice or who fail to appear before the Court will be forever barred and foreclosed of all rights in the assets of the Casualty Company of America, and of all claims against the Superintendent of In-

Notice of Motion to Confirm Report of Liquidator. 169

surance of the State of New York as liquidator of said corporation, its estate and the Superintendent of Insurance will be fully discharged and released from all liability to persons failing to comply with this notice.

PLEASE TAKE FURTHER NOTICE that 5606 claims have been presented and that after the motion to confirm the comprehensive report is heard by the Court on the 12th day of August, 1921, considerable time will be required in which to comply with the legal formalities required to be perfected before dividend checks can be mailed. If 170 creditors whose claims have been allowed will refrain from writing letters merely to inquire when checks will be received, the labor of the liquidator will be diminished and the mailing of checks expedited.

Your claim number .....has been allowed as an insurance claim at $ .....

Your claim number 573-V has been disallowed.

Your claim number .....has been suspended.

Your claim number .....has been allowed as a general claim at $.....

Dated, Albany, N. Y., July 11th, 1921.

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Yours, etc.,

JESSE S. PHILLIPS,
Superintendent of Insurance of
the State of New York.

CLARENCE C. FOWLER,
Attorney for the Superintendent of Insurance,
110 William Street, New York City.

To Claimant, Southern Electric Company.

172 **Notice of Claimant Objecting to Disallowance of Claim.**

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superin-
173 tendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

County Clerk's No. 15434-1917.

SIR:

Please take notice, that upon the annexed affidavit of Walter W. Gross, verified the 26th day of August, 1921, and upon all the proceedings had herein, the following: Bessemer Fire Brick Company, Byers Machine Company, Berry Brothers,
174 J. Baum Safe & Lock Company, John Eichleay, Jr., Company, Fischer & Jirouch Company, Guilford Lumber Manufacturing Company, Harris Granite Quarries Company, Keasbey & Mattison Company, National Lead & Oil Company, J. N. McCausland & Company, McKenna Brothers Brass Company, D. A. Matot, Pittsburgh Clay Products Company, G. G. Ray & Company, A. B. Sands & Son Company, Steward & Romaine Manufacturing Company, *Southern Electric Company,* Smith-Wadsworth Hardware Company, Tennes-

Notice of Claimant Objecting to Disallowance of Claim. 175

see Producers Marble Company, United Electric Company, J. H. Wearn & Company, B. F. Withers, Williams & Shelton Company, H. F. Watson Company, John M. Scott & Company, and Southern Gypsum Company, by Arthur F. Gotthold, their attorney, hereby oppose and object to the entry of an order and judgment approving and confirming the comprehensive and final audit and report of Jesse S. Phillips, Superintendent of Insurance of the State of New York, acting herein as Liquidator of the Casualty Company of America, in so far as said comprehensive and final audit and report disallows the claims against the said Casualty Company filed by the said claimants, and in so far as said order and judgment directs the dismissal of their said claims. 176

Please take further notice, that the said claimants upon the said affidavit of Walter W. Gross move the Court to allow their respective claims as filed and for such other and further relief as may be just and proper.

Dated, New York, August 26, 1921.

ARTHUR F. GOTTHOLD,
Attorney for Claimants, 177
Bessemer Fire Brick
Company, et al.,
Office and Post Office Address,
27 William Street,
Borough of Manhattan,
New York City.

To CLARENCE C. FOWLER, ESQ.,
Attorney for the Superintendent
of Insurance,
110 William Street,
New York City.

178 **Affidavit of Walter W. Gross, in Support of Claimant's Objections to Disallowance of Claim.**

SUPREME COURT,

NEW YORK COUNTY.

In the Matter *of* 179 The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.	County Clerk's No. 15434-1917.

STATE OF NEW YORK,
County of New York, } ss.:

WALTER W. GROSS, being duly sworn, deposes
180 and says:

I am an attorney at law associated with Arthur F. Gotthold, attorney for the following: Bessemer Fire Brick Company, Byers Machine Company, Berry Brothers, J. Baum Safe & Lock Company, John Eichleay, Jr., Company, Fischer & Jirouch Company, Guilford Lumber Manufacturing Company, Harris Granite Quarries Company, Keasbey & Mattison Company, National Lead & Oil Company, J. H. McCausland & Company, McKenna Brothers Brass Company, D. A. Matot, Pitts

Affidavit of Walter W. Gross in Support of Claimant's Objection to Disallowance of Claim. 181

burgh Clay Products Company, G. G. Ray & Company, A. B. Sands & Son Company, Steward & Romaine Manufacturing Company, *Southern Electric Company,* Smith-Wadsworth Hardware Company, Tennessee Producers Marble Company, United Electric Company, J. H. Wearn & Company, B. F. Withers, Williams & Shelton Company, H. F. Watson Company, John M. Scott & Company, and Southern Gypsum Company, all of whom have filed claims against Casualty Company of America with Jesse S. Phillips, Superintendent of Insurance of the State of New York, 182
as Liquidator of the said Casualty Company. I am familiar with the subject matter and the proceedings had herein. I am making this affidavit as the attorney for the said claimants to oppose and object to the motion of Clarence S. Fowler, attorney for the said Superintendent of Insurance, asking for the entry of an order and judgment approving and confirming the comprehensive and final audit and report of the said Jesse S. Phillips, as Liquidator of the said Casualty Company, in so far as the said comprehensive and final audit and report disallows the claims against the said Casualty Company filed by the 183
said claimants and in so far as the said order and judgment directs the dismissal of their said claims.

The facts on which the said claimants base their respective claims are as follows:

On or about the 1st day of October, 1915, John G. Unkefer & Co., a corporation organized and existing under the laws of the State of Delaware, entered into a contract with the United States of

184 Affidavit of Walter W. Gross in Support of Claimant's Objection to Disallowance of Claim.

America to erect a post office and court house building in the City of Charlotte, North Carolina; on or about the 4th day of October, 1915, the said Casualty Company and the Southwestern Surety Insurance Company by their joint and several bond, duly made, signed, sealed and executed, became sureties for the said John G. Unkefer & Co. for the true performance of its said contract to the extent of Ninety-six Thousand Dollars ($96,000), of which the said Casualty Company was severally liable for Fifty Thousand Dollars
185 ($50,000) and the said Southwestern Surety Insurance Company was severally liable for Forty-six Thousand Dollars ($46,000).

The claimants above named entered into various contracts with the said John G. Unkefer & Co. for material and labor to be used in the construction of the said post office and court house at Charlotte, North Carolina; on information and belief, all these contracts were made before May 4, 1917, the date of the order of liquidation by the Supreme Court of the State of New York of the said Casualty Company; in accordance with their said contracts the said claimants supplied the
186 said John G. Unkefer & Co. with material and labor as enumerated in their respective claims until June 13, 1917, on which date the said John G. Unkefer & Co. announced its insolvency, by reason of which it was and has been unable to pay the said claims. Whereupon the said claimants called upon the said Casualty Company and the said Southwestern Surety Insurance Company to pay for the material and labor supplied in accordance with their obligation under their said

Affidavit of Walter W. Gross in Support of Claimant's Objection to Disallowance of Claim. 187

bond and under the laws of the United States. The said Southwestern Surety Insurance Company thereupon paid to the said claimants its due share, to wit, forty-eight per cent. (48%) of the sums due the said claimants for the said material and labor. Judgment by default has been obtained by the said claimants against the said Casualty Company in the District Court of the United States for the Western District of North Carolina for fifty-two per cent. (52%) of the sums due the said claimants for the said material and labor, which is the amount due from the said 188 Casualty Company by reason of its obligation under its said bond. Claims have been filed herein by the said claimants for the sums covered by the said judgment.

The Superintendent of Insurance as Liquidator of the Casualty Company has disallowed the said claims solely on the ground, as deponent is informed, that they were contingent at the date of the order of the dissolution of the Casualty Company. The claimants object to this decision by the Superintendent of Insurance and except thereto for the following reasons, among others:

FIRST: That each of the claims is a valid obli- 189 gation of the Casualty Company under its contract obligation.

SECOND: That Paragraph 3 of Section 63 of the Insurance Law of the State of New York in so far as it purports to deny to these claimants the right to enforce the contract obligations incurred prior to the insolvency of the Casualty Company, is in violation of Article I, Section 10,

190 Affidavit of Walter W. Gross in Support of Claimant's Objection to Disallowance of Claim.

of the Constitution of the United States in that it impairs the obligation of contract.

THIRD: That the said judgments entered in favor of the said claimants against the Casualty Company of America in the District Court of the United States for the Western District of North Carolina establish the validity of the said claims and must be given full faith and credit herein.

FOURTH: That these claimants are entitled in
191 any event to have their claims considered and allowed for the purpose of sharing in any collateral held by the Casualty Company against the bond above mentioned.

WALTER W. GROSS.

Sworn to before me this 26th
day of August, 1921.

HELEN A. PARKER,
Notary Public,
New York County No. 168.
New York County Register's No. 2127.

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Order of Reference.

At a Special Term of the Supreme Court, Part I thereof, for motions, held at the New York County Court House, in and for said County in the Borough of Manhattan, City of New York, on the 2nd day of September, 1921.

Present—Hon. JAMES O'MALLEY, Justice.

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In the Matter

of

The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

195

Upon reading the comprehensive audit, report and petition made in the above-entitled proceeding by Jesse S. Phillips, Superintendent of Insurance of the State of New York, dated and duly verified the 9th day of July, 1921, and the exhibits thereto annexed and made a part thereof and marked respectively "Exhibits A, B, C, D and E", duly filed in the office of the Clerk of the County of New York on the 9th day of July, 1921; and upon reading the notice of the filing of said comprehensive audit, report and petition

196 Order of Reference.

and the notice of motion dated July 11th, 1921, for an order and judgment approving and confirming said comprehensive aduit and report, the proceedings had, * * *; fixing and determining the claims against and liabilities of said Casualty Company of America as in said comprehensive and final audit and report, allowed, disallowed or suspended; directing the dismissal of claims which have been disallowed; * * * and proof of due service of said notice of filing and notice of motion upon all the creditors, claimants and stockholders of said Casualty Company of Amer-
197 ica and its estate, by the affidavit of Jessie T. Young, duly verified the 6th day of August, 1921, all heretofore filed herein; * * * and

On reading the statements of claim and objections filed herein, viz. * * * SURETY CLAIMS * * * #573-V Southern Electric Company * * *;

And it appearing that the following claimants duly appeared in open court either personally or by their attorneys as noted and objected to the disallowance of their respective claims and requested additional time in which to file verified statements of claim and objections * * * Arthur F. Gotthold, Esq., for claimant Southern Surety Company and other claimants including the
198 Southern Electric Company * * *

And it further appearing that all of the claims and liabilities against the said Casualty Company of America have been classified in said comprehensive final audit and report and recommended for allowance, disallowance or suspension in accordance with facts in each case respectively found, and that the claimants whose claims are predicated on bonds or contracts of insurance or reinsurance issued and delivered by said Casualty Company of America prior to the commencement

of this proceeding and whose names are shown in the lists marked a, b, c, d, e, f, g, h and i of Schedule I and II of Exhibit C, D and E annexed to and made a part of said comprehensive report, audit and petition except as otherwise specifically ordered herein are insurance creditors * * * and that the balance of all claims against said Casualty Company of America have been disallowed and are listed in Exhibit D except as otherwise specifically ordered herein;

* * * * * *

And it further appearing that certain issues of fact and law must be determined with respect to 200
the claims of the aforesaid claimants who have filed statements of claims and objections herein pursuant to the requirements of Rule I, and who have appeared as aforesaid, and of those who have appeared herein and objected to the disallowance of their claims and requested additional time in which to file statements of claim and objections pursuant to Rule I.

* * * * * *

ORDERED, ADJUDGED AND DECREED that the comprehensive audit, report and petition of Jesse S. Phillips, Superintendent of Insurance of the State of New York, as liquidator, in the above-entitled 201
proceeding, dated and verified the 9th day of July, 1921, and filed in the office of the Clerk of the County of New York on said date, be and the same hereby is approved and confirmed, except as hereinafter specifically modified and changed, and it is further

* * * * * *

ORDERED, ADJUDGED AND DECREED that the claimants whose claims are based on bonds or contracts of insurance or reinsurance issued and delivered

202 Order of Reference.

by said Casualty Company of America prior to the commencement of this proceeding and whose claims are shown in the lists marked a, b, c, d, e, f, g, h, and i of Schedules I and II of Exhibits C, D and E annexed to and made a part of said comprehensive audit, report and petition, except as hereinafter otherwise specifically ordered, are insurance creditors, and it is further

* * * * * *

ORDERED, ADJUDGED AND DECREED that except as hereinafter otherwise specifically ordered, insurance creditors are entitled to share in all of the
203 assets, while general creditors are entitled to share only in the general assets, as hereinafter provided, and it is further

* * * * * *

ORDERED, ADJUDGED AND DECREED the following claims to the disallowance of which objections have been filed or to the disallowance of which claimants have appeared and objected, to wit:

* * * * * SURETY CLAIMS:

* * * * #573v- Southern Electric Company * * * be and the same hereby are referred to WILLIAM W. PELLET, Esq., of the Borough of Manhattan, New York City, an
204 attorney and counsellor of this court, who is hereby appointed referee for that purpose, to hear, take evidence on the issues raised by the answers hereinafter required and report thereon with his opinion to this court, with all convenient speed and within sixty days from the time the evidence is closed and the parties have rested respectively on each claim; * * * and said referee is authorized and directed to take up the consideration of and hearings upon said claims in such

order as may seem best to him and to the attorney for said Superintendent, and it is further

ORDERED, ADJUDGED AND DECREED that at least twenty days before the said claims shall be brought on for hearing, said Superintendent of Insurance shall serve on the attorney for the claimant a demurrer or answer in writing setting forth a general or specific denial of such allegations and facts as are disputed by him, together with a statement of any affirmative defenses which he may assert thereto, to which the claimant may reply or demur; and it is further

ORDERED, ADJUDGED AND DECREED that said referee, may, in his discretion, allow amendments to statements of claim and objections to the claims hereby referred, and established by the respective claimants to his satisfaction, or in which the facts may be established by stipulation, and (or) in which questions of law alone are involved, and to present the same to this court in a supplemental report or in supplemental reports for argument or with a statement of the facts as to each such claim and a recommendation as to the amount at which, in his judgment, the same should be allowed, and it is further

* * * * * *

ORDERED, ADJUDGED AND DECREED that the Casualty Company of America be forthwith dissolved and its corporate charter forfeited and annulled.

Enter,

J. O'M.,
J. S. C.

208

Answer of Superintendent of Insurance to Claim of Southern Electric Company.

SUPREME COURT,

NEW YORK COUNTY.

In the Matter
of
The Application of the People of the State of New York, by
209 JESSE S. PHILLIPS, as Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

In the Matter
of
The Claim of the SOUTHERN ELECTRIC COMPANY.

Surety Claim #573-V.

210 FRANCIS R. STODDARD, JR., Superintendent of Insurance of the State of New York, answering the claim of the Southern Electric Company, designated as surety claim #573-V, pursuant to an order entered herein on September 2, 1921, upon information and belief:

FIRST: Denies each and every allegation contained in the statement of claim and objections except that said claimant has filed a claim in this proceeding for $203.18 and that said claim has

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been recommended to the Supreme Court for disallowance.

FURTHER ANSWERING THE STATEMENTS OF CLAIM HEREIN AND FOR A FIRST, SEPARATE AND DISTINCT DEFENSE THERETO.

SECOND: Repeats each and every denial and realleges each and every allegation contained in the first paragraph of this answer numbered and marked "FIRST", the same as if here fully set forth and alleges that the joint and several bond of the Casualty Company of America and the Southwestern Surety Insurance Company executed on October 4, 1915, on behalf of John G. Unkefer & Company as principal and in favor of the United States of America, as obligee, guaranteeing the performance by said principal of its contract for the construction of the United States Post Office and Court House at Charlotte, N. C., was conditioned, among other things that said principal should promptly make payment to all persons supplying labor or materials in the prosecution of the work contemplated by said contract; that before any cause of action had accrued upon the claim herein made and before the claimant herein had suffered any loss or damage by reason of the failure of the contractor to pay for labor or materials furnished by the contractor or otherwise, and before such payment had become due and payable, the Casualty Company of America became insolvent and by an order of the Supreme Court of the State of New York duly held in and for the County of New York, and duly made pursuant to the provisions of Section 63 of the Insurance Law of this State, and bearing date

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the 4th day of May, 1917, was ascertained and declared to be insolvent, and the Superintendent of Insurance by said order was directed to take possession of its property and liquidate its business. That said Supreme Court did not specify or direct in said order or otherwise any date on which the rights and liabilities of said Casualty Company of America, its creditors, policyholders, stockholders or members should be fixed. That pursuant to said order the Superintendent of Insurance on the 4th day of May, 1917, duly took
215 possession and control of the said Casualty Company of America, and of its property and assets and said Casualty Company of America is still insolvent and in liquidation and in possession and control of the Superintendent of Insurance as aforesaid.

THIRD: That at the time the aforesaid order was made and at the time the Superintendent of Insurance took possession and control of said Casualty Company of America and all of its property and assets, on the 4th day of May, 1917, pursuant to said order, no cause of action had accrued in behalf of the claimant herein against
216 the Casualty Company of America under said bond or otherwise; that said labor or material had not at that time been furnished and the price therefor had not become due and payable, and whether or not it would ever be furnished or the price therefor would ever become due and payable was uncertain and depended upon contingencies which could be resolved only in the future; that claimant had suffered no loss or damage by reason of any act on the part of said

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contractor or otherwise; by reason of which facts the claim of the Southern Electric Company was contingent at the time of the entry of said order of liquidation; and is contingent and is not now a claim provable in this proceeding against the assets of the Casualty Company of America or otherwise.

FOURTH: That by reason of the foregoing facts, the claim of the Southern Electric Company should be dismissed.

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WHEREFORE, the Superintendent of Insurance demands judgment dismissing the claim of the Southern Electric Company, designated in this proceeding as surety claim #573-V.

CLARENCE C. FOWLER,
Attorney for Superintendent of Insurance,
Office & Post Office Address,
110 William Street,
New York City.

STATE OF NEW YORK,
County of New York, } ss.:

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CLARENCE C. FOWLER, being duly sworn, deposes and says that he is the Special Deputy Superintendent of Insurance and the statutory agent of Francis R. Stoddard, Jr., Superintendent of Insurance of the State of New York, in charge of the liquidation of the Casualty Company of America and is the attorney for the Superintendent of Insurance in the above entitled proceeding. That he has read the foregoing answer and knows the contents thereof, and that the same is true to the knowledge of deponent,

except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. That the sources of deponent's knowledge and the ground of his belief as to all things not stated upon his knowledge are the records of the Casualty Company of America, which deponent has in his possession and under his control and investigations which he has caused to be made by and under his direction in relation to the matters referred to, and conversations had with the officers and
221 agents of the Casualty Company of America.

Deponent further says that the reason that this verification is not made by the Superintendent of Insurance is that the said Superintendent of Insurance is not within the county where the deponent resides and has his office for the transaction of business.

CLARENCE C. FOWLER.

Sworn to before me this
29th day of April, 1922.

FLORENCE W. DOUGHERTY,
Notary Public.
Kings County Clerk No. 376.
222 New York County Clerk No. 267.

Oath of Referee. 223

SUPREME COURT,

NEW YORK COUNTY.

In the Matter *of* The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.	County Clerk's No. 15434-1917. 224 Surety Claim No. 573-V. OATH.
In the Matter *of* The Claim of the SOUTHERN ELECTRIC COMPANY.	

STATE OF NEW YORK,
County of New York, } ss.:

I, WILLIAM W. PELLET, the referee appointed herein, do solemnly swear and declare that I will faithfully and fairly discharge my duty upon the reference herein, and hear and take evidence, and will make a just and true report, with my opinion, according to the best of my understanding. 225

WILLIAM W. PELLET.

Subscribed and sworn to before me
this 3rd day of May, 1922.

J. M. B. ARTHURAND,
Notary Public, Westchester Co.
Certificate filed N. Y. Co. 268.

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Summons of Referee.

SUPREME COURT,

NEW YORK COUNTY.

In the Matter
of
The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superin-
227 tendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

In the Matter
of
The Claim of the SOUTHERN ELECTRIC COMPANY.

County Clerk's No. 15434-1917.
Surety Claim No. 573-V.

Summons.

228 By virtue of an order made in the above entitled proceeding by Special Term of the Supreme Court of New York, Part I thereof, entered in the above entitled proceeding on the 2nd day of September, 1921, I, William W. Pellet, the Referee appointed in the above entitled proceeding, do hereby summon you to appear at my office, No. 233 Broadway, Borough of Manhattan, City, County and State of New York, on the 24th day of May, 1922, at 10 o'clock in the forenoon, to attend a hearing of the matters in said proceed-

Order of Reference. 229

ing referred to me as such referee, pursuant to such order. And hereof fail not at your peril.

Dated, New York, May 3rd, 1922.

WILLIAM W. PELLET.
Referee.

To ARTHUR F. GOTTHOLD, Esq.,
27 William Street,
New York City.

UNDERWRITING:

To hear, take evidence on the issues raised by the answer of FRANCIS R. STODDARD, JR., as Superintendent of Insurance of the State of New York, and to report thereon, with opinion, to the Supreme Court of New York, New York County, with all convenient speed. 230

(Admission of service, dated May 3, 1922, by Arthur F. Gotthold, as attorney for claimant.)

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Opinion of Referee.

SUPREME COURT,

NEW YORK COUNTY.

In the Matter
of
The Application of the People of the State of New York, by
233 JESSE S. PHILLIPS, as Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

In the Matter
of
The Claim of SOUTHERN ELECTRIC COMPANY.

Surety Claim No. 573-V.

234 I cannot distinguish this claim from those which were held to be contingent *In the Matter of Empire State Surety Company*, 216 N. Y., 273, and *People* vs *Metropolitan Surety Company*, 211 N. Y., 107.

The order of liquidation was made herein on May 4, 1917, and under the provisions of the federal statute, chapter 778 of United States Statutes at large, the claimant could not bring suit on the bond until six months after the completion

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and final settlement of the contract. Concededly, the contract was not completed and finally settled until long after May 4, 1917. The claim must therefore be disallowed.

The claimant has raised certain constitutional objections to the disallowance of the claim and has requested the Referee to make certain findings based on such objections. The requests are all refused. As the claimant may desire to have the fact appear that he has raised the constitutional questions, the report to be submitted to the court should be settled upon notice to the attorney for the claimant.

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Dated, New York, February 6, 1923.

WILLIAM W. PELLET,
Referee.

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Report of Referee.

SUPREME COURT,

NEW YORK COUNTY.

In the Matter
of
The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superin-
239 tendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

In the Matter
of
The Claim of the SOUTHERN ELECTRIC COMPANY.

Surety Claim No. 573-V.

TO THE SUPREME COURT:

240 The undersigned, heretofore duly appointed referee by Special Term of the Supreme Court, in and for the County of New York, State of New York, pursuant to an order entered herein on the 3rd day of September, 1921, to take evidence and report on the issues in the above entitled proceeding respectfully reports:

That before entering upon the discharge of the business of such referee he duly took and subscribed the referee's oath of office.

That he issued a summons or notice of hearing returnable the 24th day of May, 1922, at 10 o'clock in the forenoon in the office No. 233 Broadway, Borough of Manhattan, City, County and State of New York. 241

That pursuant to said summons he was attended on the date set forth in the summons or notice of hearing, by Clarence C. Fowler, Esq., attorney for the Superintendent of Insurance by Albert Reese, of counsel, and by Arthur F. Gotthold, Esq., attorney for the claimant herein by Joseph G. Deane, Esq., of counsel. That thereafter several hearings were had and testimony taken on behalf of the claimant. 242

This claim is made by the Southern Electric Company for material furnished to John G. Unkefer & Company in May or June, 1917, on a contract which John G. Unkefer had with the United States Government for the erection of a Post Office Building in Charlotte, North Carolina. On or about May 4th, 1917, the Casualty Company of America, one of the sureties of the bond of John G. Unkefer & Company, went into liquidation pursuant to an order of the Supreme Court of the State of New York, entered therein on said date and on or about June 9, 1917, John G. Unkefer & Company defaulted in their contract, and the Southwestern Surety Company, one of the sureties on the bond of John G. Unkefer & Company, completed said contract under Chapter 778, of the United States Statutes at Large, and the claimant could not bring suit on the bond until six months after the completion and final settlement of the contract. Concededly, the contract was not completed and final settlement made until 243

244 Report of Referee.

long after the date of the entry of the order of liquidation of the Casualty Company of America. No cause of action having accrued in favor of the Southern Electric Company, the claimant herein, and against Casualty Company of America until after May 4th, 1917, the date of the order of liquidation of said Company, the claim of the claimant herein is contingent and should be disallowed and dismissed as an insurance claim against the estate of the Casualty Company of America.

245 The claimant has insisted on the hearings before me and on the submission of the controversy that its claim should be allowed by reason of the fact that its disallowance would be contrary to the Constitution and Statutes of the United States. The claimant contends that the claim is established in fact and is therefore protected and entitled to allowance under and by reason of the following constitutional provisions:

I.—The judgment of the United States District Court for the Western District of North Carolina is conclusive as to the claim herein of the Southern Electric Company, and is entitled to full
246 faith and credit under Article 4, Section 1, United States Constitution.

II.—If Section 63 (3) of the Insurance Law of the State of New York prevents the Southern Electric Company from recovering herein, it causes an unreasonable classification of the rights of the corporate surety as against the natural surety, and as such is class-legislation and violates the 14th amendment to the Constitution of the United States.

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III.—If Section 63 (3) of the Insurance Law of the State of New York prevents the Southern Electric Company from recovering herein, it impairs the obligation of the contract between the United States and the Casualty Company of America, out of which spring the rights of the Southern Electric Company and is, therefore, unconstitutional under Article I, Section 10, Clause 1. United States Constitution.

IV.—To refuse to enforce the claim of the Southern Electric Company herein is to deprive the claimant of its vested right under the bond between the United States and the Casualty Company of America, which bond was unaffected by §63 (3) of the Insurance Law of the State of New York and is therefore unconstitutional, as a taking of property without due process of law, under the 14th amendment to the Constitution of the United States.

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V.—The decisions of the federal courts interpreting 33 U. S. Statute at Large, 778, uphold the rights of Southern Electric Company to recover herein. The courts of New York are obligated to adopt Federal decisions on the Statute, even though contrary to New York decisions.

249

These contentions have been duly considered but for the reasons set forth more specifically in my opinion they are hereby overruled.

Conclusion.

I recommend that the claim of Southern Electric Company designated as Surety Claim No.

250 Report of Referee.

573-V, against the estate of the Casualty Company of America, be dismissed and disallowed.

Dated, New York, N. Y., March 9, 1923.

WILLIAM W. PELLET,
Referee.

Consented to as to form

ARTHUR F. GOTTHOLD,
Attorney for Southern Electric Co.,
Claimant.

251 CLARENCE C. FOWLER per BALL,
Attorney for Superintendent of Insurance.

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Notice of Motion to Confirm Report of Referee and to Disallow Claim.

SUPREME COURT,

NEW YORK COUNTY.

In the Matter
of
The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

254

In the Matter
of
The Claim of SOUTHERN ELECTRIC COMPANY.

Surety Claim No. 573-V.

255

Please take notice that upon (1) the order directing the liquidation of the Casualty Company of America entered herein on the 4th day of May, 1917; (2) so much of the report and petition of Jesse S. Phillips, as Superintendent of Insurance of the State of New York, and liquidator of the Casualty Company of America, filed herein on July 11th, 1921, as disallowed the claim of the Southern Electric Company designated herein as Surety Claim No. 573-V; (3) the order of reference entered herein on the 3rd day

256 Notice of Motion to Confirm Report of Referee and to Disallow Claim.

of September, 1921, referring said claim to William W. Pellet, Esq., to hear, take evidence and report thereon; (4) the answer of the Superintendent of Insurance served upon the claimant as required by said order of September 2nd, 1921; (5) the summons of the referee served upon the claimant and due proof of service thereof; (6) the report of William W. Pellet, Esq., the referee herein filed on the 31st day of March, 1923; (7) the minutes of the hearings before said referee filed the 31st day of March, 1923, and upon all
257 the papers in the above entitled proceeding, the undersigned will move this Court at a Special Term, Part 1 thereof, to be held in the County Court House, Borough of Manhattan, City of New York, on the 11th day of April, 1923, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard for an order, dismissing and disallowing the claim of the Southern Electric Company designated herein as Surety Claim 573-V, and for such other and further relief as to the Court may seem just and proper

Dated, New York, N. Y., March 31st, 1923.

258 CLARENCE C. FOWLER,
Attorney for Superintendent of Insurance,
Office & Post Office Address,
110 William Street,
Borough of Manhattan,
City of New York.

To ARTHUR F. GOTTHOLD, Esq.,
Attorney for Claimant,
27 William Street,
Borough of Manhattan,
City of New York.

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Proposed Findings of Fact and Conclusions of Law of Claimant.

SUPREME COURT,

NEW YORK COUNTY.

In the Matter
of
The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

260

In the Matter
of
The Claim of SOUTHERN ELECTRIC COMPANY.

Surety Claim No. 573-V.

261 The claimant Southern Electric Company submits the following findings of facts, which it deems to be established by the findings and the following conclusions of law, all of which it respectfully asks the Court to find.

FINDINGS OF FACT.

I.—That John G. Unkefer & Co., a Delaware corporation, furnished a bond to the United States, dated October 4, 1915, in the sum of $96,000 for the due performance of its contract

262 Proposed Findings of Fact and Conclusion of Law of Claimant.

with the United States for the erection of a Post Office building at Charlotte, N. C., and for the prompt payment of all persons supplying labor and materials therefor.

II.—That the Southwestern Surety Insurance Company and the Casualty Company of America were the sureties on the said bond, the former being liable as such for $46,000 or 48% thereof, and the latter as such being liable for $50,000 or 52% thereof.

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III.—That early in the year 1917 and previous to May 4, 1917, the Southern Electric Company, the claimant herein, contracted to sell to John G. Unkefer & Co. certain electrical supplies of the agreed price and reasonable value of $201.23, which electrical supplies were to be used by the said John G. Unkefer & Co. in the construction of the Post Office.

Found, except as to first line and that part of the second line ending with "1917."

IV.—That the said electrical supplies in the
264 amount of $201.23 were delivered by the claimant herein to John G. Unkefer & Co. before May 4, 1917.

Refused—J. O'M., J. S. C.

V.—That the said electrical supplies in the amount of $201.23 were actually used in the construction of and placed in the said Post Office Building by John G. Unkefer & Co. before June 13, 1917.

VI.—That the said electrical supplies in the

Proposed Findings of Fact and Conclusion of Law of Claimant. 265

amount of $201.23 were not paid for by John G. Unkefer & Co. nor any part thereof.

VII.—That on May 4, 1917, the Casualty Company of America went into liquidation pursuant to an order of the Supreme Court of the State of New York.

VIII.—That John G. Unkefer & Co. became insolvent and ceased work under its said contract for the erection of the said Post Office Building at Charlotte, N. C., on June 13, 1917. 266

IX.—That the Southwestern Surety Insurance Company paid to the claimants herein the sum of $97.38, being 48% of the sum of $201.23 due the claimant herein for the said electrical supplies.

X.—That the remaining 52% of the sum of $201.23 due the claimant herein for the said electrical supplies, to wit: the sum of $105.50, has not been paid to the claimant herein and is still due and owing to it.

Found, except as to "and is still due and owing to it."—J. O'M., J. S. C. 267

XI.—That in an action brought against the Casualty Company of America in the United States District Court, for the Western District of North Carolina, a judgment was duly recovered by the Southern Electric Company, the claimant herein, against the Casualty Company of America in the sum of $105.50 for the balance due and owing to the claimant herein for the said electrical supplies.

268 Proposed Findings of Fact and Conclusion of Law of Claimant.

CONCLUSIONS OF LAW.

1. That the judgment of the United States District Court for the Western District of North Carolina is entitled to full faith and credit herein under Article IV, Section 1, of the Constitution of the United States.

Refused—J. O'M., J. S. C.

2. That the said judgment establishes the claim herein of the claimant in the sum of $105.50 and
269 is conclusive on the Courts of the State of New York.

Refused—J. O'M., J. S. C.

3. That under the terms of the said bond the Casualty Company of America, or the liquidator thereunder, is liable to the claimant herein in the sum of $105.50 for its proportion of electrical supplies furnished by the claimant in the construction of the said Post Office Building in Charlotte, North Carolina, to wit: 52% thereof.

Refused—J. O'M., J. S. C.

4. That on May 4, 1917, the date of the order
270 of liquidation of the Casualty Company of America, the claim of the claimant herein against the Casualty Company of America was not contingent.

Refused—J. O'M., J. S. C.

5. That on May 4, 1917, the claim of the claimant herein against the Casualty Company of America was vested.

Refused—J. O'M., J. S. C.

Proposed Findings of Fact and Conclusion of Law of Claimant. 271

6. That Section 63 (3), (Laws of 1909, Chapter 33), of the Insurance Law of the State of New York, cannot prevent the claimant from recovering herein, because if it does,

(*a*) it causes an unreasonable classification of the rights of the corporate surety as against the natural surety, and as such, is class legislation and violates the 14th amendment of the Constitution of the United States;

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(*b*) it impairs the obligation of the contract between the United States and Casualty Company of America, out of which spring the rights of the Southern Electric Company and is therefore unconstitutional under Article I, Section 10, Clause 1, of the Constitution of the United States;

(*c*) it deprives the claimant herein of its vested right under the said bond between the United States and the Casualty Company of America, which bond was unaffected by Section 63 (3), (Laws of 1909, Chapter 33), of the Insurance Law of the State of New York, and thus takes property without due process of law and is therefore unconstitutional under the 14th Amendment to the Constitution of the United States. Refused—J. O'M., J. S. C. 273

7. The decisions of the Federal Courts inter-

274 Proposed Findings of Fact and Conclusion of Law of Claimant.

preting 33 U. S. Statutes at Large, 778, unhold the rights of the claimant to recover herein and the Courts of New York are obligated to adopt and follow the said Federal decisions.

Refused—J. O'M., J. S. C.

8. That the Southern Electric Company, the claimant herein, is entitled to an order directing the State Superintendent of Insurance to allow its claim herein in the sum of $105.50.

Refused—J. O'M., J. S. C.

275 Dated, New York, April 7, 1923.

Respectfully submitted,

ARTHUR F. GOTTHOLD,
Attorney for Claimant, Southern Electric Company.

All of the foregoing found except as otherwise noted.

J. O'M.,
J. S. C.

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Exceptions of Claimant to Refusals to Find. 277

SUPREME COURT,

NEW YORK COUNTY.

In the Matter
of
The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA. 278

In the Matter
of
The Claim of the SOUTHERN ELECTRIC COMPANY. Surety Claim #573-V.

SIRS: 279

Please take notice that the claimant Southern Electric Company excepts to the refusals of the Court and each of them to find the facts contained in the claimant Southern Electric Company's proposed findings of fact submitted herein, as follows:

FIRST: To the refusal of the Court to find the facts contained in the first line and that part of the second line ending with "1917" in that para-

280 Exception of Claimant to Refusals to Find.

graph numbered III, on the ground that the evidence sustains such findings.

SECOND: To the refusal of the Court to find the facts contained in that paragraph numbered IV, on the ground that the evidence sustains such findings.

THIRD: To the refusal of the Court to find so much of the facts contained in that paragraph numbered X reading as follows: "and is still due and owing to it," on the ground that the evidence
281 sustains such findings.

Claimant Southern Electric Company also excepts to the refusals of the Court to find the conclusions of law and each of them contained in claimant Southern Electric Company's proposed findings submitted herein, as follows:

FOURTH: To the refusal of the Court to find the conclusions of law contained in that paragraph numbered 1.

FIFTH: To the refusal of the Court to find the conclusions of law contained in that paragraph numbered 2.

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SIXTH: To the refusal of the Court to find the conclusions of law contained in that paragraph numbered 3.

SEVENTH: To the refusal of the Court to find the conclusions of law contained in that paragraph numbered 4.

EIGHTH: To the refusal of the Court to find

Exception of Claimant to Refusals to Find. 283

the conclusions of law contained in that paragraph numbered 5.

NINTH: To the refusal of the Court to find the conclusions of law contained in that paragraph numbered 6.

TENTH: To the refusal of the Court to find the conclusions of law contained in that paragraph numbered 7.

ELEVENTH: To the refusal of the Court to find the conclusions of law contained in that paragraph 284
numbered 8.

Dated, June 4, 1923.

Yours, etc.,

ARTHUR F. GOTTHOLD,
Attorney for Claimant, Southern
Electric Company,
Office and P. O. Address,
27 William Street,
Borough of Manhattan,
New York City.

To CLARENCE C. FOWLER, Esq.,
Attorney for Superintendent of Insurance, 285
110 William Street,
New York City.

CLERK OF THE COUNTY OF NEW YORK.

286 **Testimony.**

SUPREME COURT,

NEW YORK COUNTY.

Before WILLIAM W. PELLET, Esq., Referee.

In the Matter
of
The Application of the People of the State of New York, by JESSE S. PHILLIPS, Superintendent of Insurance, for an
287 order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

In the Matter
of
The Claim of SOUTHERN ELECTRIC COMPANY.

Surety Claim No. 573-V.

Hearing continued this 20th day of October, 1922, pursuant to adjournment.

288 APPEARANCES:

ARTHUR F. GOTTHOLD, Esq.,
Attorney for Claimant.
JOSEPH G. DEANE, Esq.,
Of Counsel.
CLARENCE C. FOWLER, Esq.,
By Messrs. T. A. BALL and A. W. MORGAN,
Attorney for Superintendent of Insurance.

CHARLES G. UNKEFER, called as a witness on be-

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half of the claimant, being duly sworn, testified as follows:

Direct-examination by Mr. Deane:

Q. Where do you reside? A. Beaver Falls, Pennsylvania.

Q. Were you, in 1915, 16 and 17, connected with John G. Unkefer & Company? A. Yes, sir.

Q. They were the contractors who were building the courthouse at Charlotte, North Carolina? A. Yes, sir.

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Q. Did you have anything to do with that job? A. Yes, sir.

Q. What was your position? A. Superintendent for the contractor.

Q. Were you on the job? A. Yes, sir.

Q. How long did you continue on it? A. From about the middle of October.

Q. October what year? A. Fifteen.

Q. Until when? A. Until June.

Q. What year? A. Eighteen, about the third of June.

Q. Do you know whether or not the Southern Electric Company supplied any merchandise to your company for that job? A. Yes, sir.

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Q. Do you recall about when that material was ordered? A. I should judge it was ordered early in seventeen.

Q. Do you remember when it was shipped? A. Not exactly, along the early part of May.

Q. Was this material received on the job? A. Yes, sir.

Q. What was done with it? A. It was used on the job, there were switches and switch plates.

Q. And you know of your own knowledge that it was put in the building? A. Yes, sir.

Q. Do you remember the amount of their bill? A. Not in dollars and cents.

Q. Was it paid for by your company? A. I didn't pay bills; I should judge it wasn't paid.

Q. Do you know whether or not, from book records, it was not paid? A. From book records, it wasn't paid; I know that.

Q. When did your concern cease working on the job? A. On June 9th, 1917.

Q. Did you continue on the job personally after that? A. Yes, sir.

Q. Do you know who it was completed the job?
293 A. I was on the job until it was completed by the Southern Surety Company.

Cross-examination by Mr. Ball:

Q. What day was the earliest date you received any materials from the Southern Electric Company? A. I could not answer that; it was early in May.

Q. You don't know the date? A. No.

Q. You say the materials received from them were switches? A. Switches and plates of different kinds.

Q. You don't know the exact amount of their
294 claim, first, against your company, and, then, against the Casualty Company of America? A. From the bills that were O. K'd by John G. Unkefer & Company, it was approximately $200.

Q. You don't know whether the bill was paid by your company or not, John G. Unkefer & Company? A. It was not paid by J. G. Unkefer & Company.

Q. Do you know it of your own knowledge? A. From the book records.

Q. You have seen those records? A. Yes, sir.

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Q. You had nothing to do with the paying? A. No, sir.

Mr. Ball.—I want to enter an objection to this testimony as incompetent, irrelevant and immaterial and the further objection that the claim of the Southern Electric Company is a claim from a third party against the Casualty Company of America on a bond that ran to the United States of America and move to strike out the testimony.

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Re-direct-examination by Mr. Deane:

Mr. Deane.—I offer in evidence certified copy of judgment in the suit of United States of America to the use of John A. Rowe Cut Stone Company against Casualty Company of America and others, being No. 73 in the District Court of the United States for the Western District of North Carolina, judgment entered the 24th day of August, 1921.

Mr. Ball.—I object to it as immaterial, irrelevant and incompetent and not binding on the liquidator, having been entered after the order of liquidation.

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(Received and marked Claimant's Exhibit 1).

(Claimant's Exhibit 1 is printed herein on page 118, fol. 352).

Q. Mr. Unkefer, referring to Claimant's Exhibit 1 of this date, will you please look it over and tell me whether or not you recognize the

names of the persons shown in that judgment? A. Yes, sir.

Q. Who are they, were these persons employed by you? A. They all furnished material on the job at Charlotte, North Carolina.

Q. Each one of those? A. Every one of them.

Q. You have been over that list? A. Yes.

Q. Do you know whether the materials they furnished were actually used on the job? A. Yes, sir.

299 Q. Were those materials furnished prior to the time your company became insolvent in June, 1917? A. Yes, sir.

Q. These men all furnished material to you for the purpose of the construction of the courthouse at Charlotte? A. Yes, sir.

Q. And the materials they furnished, do you know whether or not they actually went into the job? A. Yes, sir.

Q. That is true of each of these claimants? A. Yes, sir.

Q. After your company became insolvent and you continued on the work, by whom were you employed? A. By Mr. Fields, director of the

300 Southern Surety Company; I had all dealings with Mr. Fields.

Q. Did you stay on the job until it was completed? A. Yes, sir.

Q. Do you know by whom the job was being completed? A. Yes, the Southern Surety Company.

Re-cross-examination by Mr. Ball:

Q. Did you say that part of this material was

301 used by the Southern Surety Company after your company went out of business? A. No.

Q. It was all used by your company? A. There may have been some on the ground that wasn't used but it all went into the building; it was all on the ground before the Southern Surety Company took it over.

Q. Are you sure it was all delivered to your company before your company failed or discontinued work, was all of this material delivered to your company or was some of it delivered afterward to the Southern Surety Company? A. There is one claim I cannot be positive of, Gil- 302 ford Lumber Company.

By Mr. Deane:

Q. How much is that? A. $1,006.29, that claim, they furnished materials afterwards.

By Mr. Ball:

Q. The rest of it was all furnished to your company before it discontinued work? A. Yes, sir.

Q. Do you know how much material or what amount of material was furnished by the Southern Electric Company, do you know how many plates, etc.? A. No, five years is a good while to re- 303 member those things.

Q. What was it, plates and what else? A. Switches and plates, different kinds of switches and different kinds of plates.

By Mr. Deane:

Q. Will you look at this paper and see if that refreshes your recollection as to what was delivered by the Southern Electric Company and

304 Charles G. Unkefer for Claimant—Re-cross.

the amount. Does it refresh your recollection? A. The bill looks very familiar but I hate to swear to it.

By Mr. Ball:

Q. Did you actually check the material as it came in? A. Yes, sir.

By Mr. Deane:

Q. And checked it against the invoices? A. Yes, sir; our method is to have duplicate bills of everything; I kept the duplicates with my records
305 and, of course, I destroyed them when I destroyed the balance of my papers.

Mr. Ball.—You say your company discontinued work there the 9th of June, 1917?

Witness.—I think it was the eighth or ninth.

Mr. Deane.—It was in June, 1917.

Witness.—Yes.

Mr. Ball.—Did the Southwestern Surety Company begin work on that right after your company quit or was there some intervening time between?

Witness.—There was just a few days in-
306 tervening time.

Mr. Ball.—More than a week, would you think?

Witness.—Yes, a little over a week; I know the Southern Surety Company paid my time and paid the foreman's time.

Mr. Dean.—I offer in evidence bond dated October 4th, 1915, made by John J. Unkefer & Company, Casualty Company of America and Southwestern Surety Insur-

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ance Company to United States of America.

Mr. Ball.—I don't object to the form of the proof but I do object on the ground that it is incompetent, immaterial and irrelevant.

(Received and marked Claimant's Exhibit 2.)

(Claimant's Exhibit 2 is printed herein on page 121, fol. 361.)

By Mr. Ball:

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Q. What connection did you have with J. G. Unkefer & Company? A. Superintendent.

Q. Were you interested in the company any other way? A. Yes, sir.

Q. As a stockholder? A. Yes, sir.

Q. Were you an officer of the company? A. Yes, sir, vice-president.

Mr. Deane.—Were you superintendent on the job also?

Witness.—Superintendent on the job.

Further hearing adjourned to December 6, 1922, at 2.30 P. M.

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SUPREME COURT,

NEW YORK COUNTY.

In the Matter
of
The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superintendent of Insurance, for an order to take possession of the property and liquidate the
311 business of the CASUALTY COMPANY OF AMERICA.

In the Matter
of
The Claim of SOUTHERN ELECTRIC COMPANY.

Surety Claim No. 573-V.

Before WILLIAM W. PELLET, Esq., Referee.

Hearing continued this 6th day of December, 1922, pursuant to adjournment.

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APPEARANCES:

CLARENCE C. FOWLER, Esq.,
(by T. A. BALL, Esq.),
Attorney for Superintendent of Insurance.
ARTHUR F. GOTTHOLD, Esq.,
Attorney for Claimant.
WALTER W. GROSS, of Counsel.

THOMAS F. FIELDS, called as a witness on behalf

of the claimant, being duly sworn, testified as follows:

Direct-examination by Mr. Gross:

Q. Mr. Fields, where do you reside? A. Washington, D. C.

Q. Are you connected with the Southwestern Surety Company? A. Yes, sir.

Q. And you were connected with the Southwestern Surety Company in 1917? A. Yes, sir.

Q. Will you explain just what your position was with reference to that company? A. I was the attorney for that company, looking after its 314 various business matters in the District of Columbia and places more or less nearby, sometimes as far South as Louisiana and sometimes as far North as Vermont.

Q. I show you a bond made on October 4th, 1915, by John G. Unkefer & Company with the Casualty Company of America and Southwestern Surety Company as sureties and ask you if you are familiar with that bond? A. Yes, sir, I am; this is a photostat copy of the bond on file in the Treasury Department, Supervising Architect's Office, at Washington; it is a photostat copy, being made from a typewritten copy; in other words, the Department makes the typewritten 315 copy with signatures in typewriting.

> Referee.—I might state that the various objections made by Captain Ball at the last hearing have been overruled and exceptions granted.

Q. For the Southwestern Surety Company, did you have charge of the work in connection with this job? A. After the contractors had ceased

work, on the 13th of June, 1917, I had exclusive charge of the work until its final completion and acceptance by the Government.

Q. When were you notified of the insolvency of John G. Unkefer & Company? A. Within a day or two after they ceased the work.

Q. When was that? A. They ceased on the 13th day of June, 1917, and I received notice I should say probably the 14th or 15th of the month.

Q. Did you go to Charlotte, North Carolina, then? A. I first went to Minerva, Ohio, where the principal office of the contractor was and
317 where the books and records were kept and I then came to New York for the purpose of seeing the Superintendent of Insurance and saw Mr. Wright, Moses J. Wright, and then went to Charlotte.

Q. When was that, could you say approximately? A. Well, it was certainly between the 15th of June and the 1st of July.

Q. Can you explain the situation as to the completion of the building in Charlotte when you got down there? A. The building at that time, in so far as the Government was concerned, was in charge of Alexander Blumberg, as superintend-
318 ent, called a field superintendent by the Architect's Office, and the building was entirely under roof; a great deal of the millwork was in place; all of the iron work was done; the heating plant was completed, including the radiators and the boilers; the electrical work was entirely complete with the exception, as I now recall, of one switch; the plumbing was completed and, in fact, the entire structural work of the building together with the mechanical appliances was completed and the main work left to be done consisted almost entirely

of interior finish and finishings and some exterior work in the way of laying concrete sidewalks and entrance ways and providing hitching rails and other things of that kind; at that time, the building was, according to the official reports—I will state the substance, if I may, because I will give you the original of the report—was eighty-one per cent. and a fraction entirely completed according to the original plans and specifications; as you gentlemen probably know, the Government puts a field superintendent in charge of Federal construction work; he is in constant touch with the Supervising Architect's Office at 320 Washington and, among other things, he is required to render progress reports every month to the Department; a duplicate original of that report being furnished to the contractor; I have in my hand Superintendent Blumberg's duplicate original progress report of this work for June, 1917; I am able to identify the signature to this report as that of Mr. Alexander Blumberg as I have frequently seen him write his name in Salem, Washington and Nashville; I will be very glad to leave that with you, if you want it.

Mr. Gross.—I offer that in evidence.

Mr. Ball.—I object to the receipt of that 321 in evidence on the ground that it is incompetent and immaterial.

Referee.—Overruled; I will take it.

Mr. Ball.—Exception.

Received and marked Claimant's Exhibit 3.

(Claimant's Exhibit 3 is printed herein on page 124, fol. 370).

Q. Did you go through the building when you

322 Thomas F. Fields for Claimant—Direct.

got to Charlotte? A. Entirely through, from top to bottom, minutely, inside and outside.

Q. From your examination of the building, can you state approximately how much of it was completed on May 4th, 1917? A. Four-fifths.

Q. Four-fifths of the building was completed on May 4th, 1917? A. Yes, sir.

Mr. Ball.—I object to this on the ground that it is incompetent and immaterial and irrelevant.

Referee.—Overruled.

323 Mr. Ball.—Exception.

Q. I show you a certified copy of a judgment entered in the District Court of the United States for the Western District of North Carolina in the matter of the United States, for the use of John A. Rowe Cut Stone Company, against Casualty Company of America, et al., and I ask you whether you know if the amounts of all the judgment creditors covered therein, with the exception of the Southwestern Surety Insurance Company, were for material put into this Courthouse before June 13, 1917.

324 Mr. Ball.—I object to the receipt of that in evidence.

Mr. Gross.—It is already in evidence.

Mr. Ball.—Then I object to the question on the ground that it is incompetent and not binding on the Superintendent of Insurance as Liquidator of the Casualty Company of America.

Referee.—The judgment is already in evidence.

Mr. Gross.—I am asking him to state

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whether the amounts covered therein were for material furnished before June 13, 1917.

Mr. Ball.—This is for the purpose of determining the amount, I believe, and it is not binding on the Liquidator.

Mr. Gross.—I will change that question.

Q. I show you a certified copy of a judgment entered in the District Court of the United States for the Western District of North Carolina in the matter of the United States of America, for the use of John A. Rowe Cut Stone Company, against 326
Casualty Company of America, et al, and ask you whether you know if the judgment creditors named in this judgment, with the exception of the Southwestern Surety Insurance Company, furnished material for the courthouse building before June 13, 1917? A. I found installed in the building material of various kinds which these different judgment creditors claimed to have furnished; I investigated all of these claims with the utmost care, both from the books of the contractor and by correspondence and personal interviews with the materialmen themselves and I did not find that the material of the kind called for had 327
been furnished or claimed to have been furnished by any other materialmen and after the completion of the building, all these accounts were examined in detail, liquidated as to the amount by agreement, compromise or otherwise and, in behalf of the Southwestern Surety Company, I paid to each one of these creditors fifty-two per cent. of the amount of their bills due for materials which had been furnished prior to the time of the contractor's default and these materialmen are

328 Thomas F. Fields for Claimant—Direct.

listed in the judgment roll and the amounts set opposite their names represent the remaining fifty-two per cent. of their claims for such material.

Referee.—Remaining forty-eight per cent., isn't it?

Witness.—Fifty-two per cent.

Referee.—You said fifty-two per cent. had been paid.

Witness.—Correct that to forty-eight per cent., please—the basis of our settle-
329 ment being proportioned to the division of the penalty of the bond, that is to say, the principal of the bond is $96,400, of which we carried $46,400 and the Casualty Company of America the remaining $50,000. I may add, if you please, that with respect to all labor and material furnished for the completion of the building after we took over the work, the payments were made in cash in full.

Q. Were the payments made after you took over the work included in the judgment? A. None at all.

330 Q. Can you state whether the amounts set forth in this judgment were paid to the judgment creditors by John G. Unkefer & Company? A. They certainly were not; I don't think we should have paid any part of them if that were so.

Q. You examined the books of John G. Unkefer & Company before you paid those? A. Yes, sir, and the books of the creditors themselves and the invoices and bills of lading.

Q. I call your attention particularly to the

judgment of Gilford Lumber Company in the amount of $1,006.29; can you state when this material was delivered and installed in the Post Office Building?

Mr. Ball.—I object to that as incompetent, irrelevant and immaterial in this case, this proceeding.

Referee.—I will take it.

Mr. Ball.—Exception.

Q. That item of $1,006.29 represents fifty-two per cent of the amount which was due to the Gilford Lumber Company for lumber and millwork already furnished and installed in the building prior to the time the contractor defaulted; the balance of that bill having been paid by the Southwestern; at the time we took over the work and at the time the contractors ceased, there was a shipment in Charlotte from the Gilford Lumber Company which had been stopped in transit; that shipment I took up and paid for in full, as I did for all subsequent shipments, but, this item mentioned in the judgment roll, was, as I have stated, for what we call, for convenience, a back bill of the Gilford Lumber Company. 332

Q. With reference to the bond previously offered in evidence, was any collateral put up by John G. Unkefer & Company with the surety companies at the time this bond was made? A. Certainly none with the Southwestern and, if I may quote Mr. Wright, the Assistant Superintendent of Insurance, certainly none with the Casualty Company of America. 333

Claimant Rests.

Mr. Ball.—I move to strike out all the

334 Thomas F. Fields for Claimant—Direct—Cross.

evidence of the witness referring to deliveries of material before June 13, 1917, on the ground that it does not appear that the terms of the bond were broken or that the contractor defaulted until that day and, therefore, no cause of action would arise as against the Casualty Company of America, as surety, until on or after that day, which was after the date of liquidation of said Casualty Company of America.

Referee.—If material had been delivered and not paid for, wasn't there a default
335 then?

Mr. Ball.—I don't think that's really a default.

Referee.—I will deny the motion.

Mr. Ball.—Exception.

Cross-examination by Mr. Ball:

Q. As I understood from you, Mr. Fields, the contractors didn't actually default in their construction work until June 13th, 1917? A. Yes, that is to say, they did not actually cease carrying on the work until that day; the work, however, as you have seen from the report, had been
336 progressing very lamely for sometime.

Q. But no notice had been served on the Southwestern Surety Company of any default on the part of the Government? A. No, sir, not until they actually ceased work.

Mr. Gotthold.—The claimant requests the Referee to find as follows:

I.—The judgment of the United States District Court for the Western District of North Carolina must be conclusive evi

dence of the probability of the claim of the Southern Electric Company. Otherwise, Article 4, Section 1, United States Constitution, prescribing full faith and credit to judgments of sister states, is violated. 337

II.—Section 63 (3) Insurance Law works an unreasonable classification of the rights of the corporate surety as against the rights of the natural surety. It is therefore class legislation and unconstitutional under the 14th Amendment to the Constitution of the United States. 338

III.—Section 63 (3) impairs the obligation of the contract between the United States and the Casualty Company of America, out of which spring the rights of the Southern Electric Company. It is, therefore, unconstitutional under Article 1, Section 10, Clause 1, United States Constitution.

IV.—Since Section 63 (3) is not part of the contract between the United States and the Casualty Company of America, the obligation of the Casualty Company has become vested. To refuse to so hold is to take away an essential element of the contract right and, therefore, unconstitutional as taking property without due process of law. 339

14th Amendment, Constitution of United States.

V.—The Statute, 33 Stat. at Large, 778, on which the rights of the Southern Electric Company arise, being a Federal Stat-

340 Thomas F. Fields for Claimant—Cross.

ute giving a right of action, it is the duty of the New York Courts to adopt the Federal decisions on the point, even if they contradict the New York decisions.

Further hearing adjourned to December 11, 1922, 2:30 P. M.

SUPREME COURT,

NEW YORK COUNTY.

341

In the Matter
of
The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

342

In the Matter
of
The claim of SOUTHERN ELECTRIC COMPANY.

Surety Claim No. 573-V.

Before William W. Pellet, Esq., Referee.

Hearing continued this 11th day of December, 1922, pursuant to adjournment.

Arthur W. Morgan for Superintendent of Insurance—Direct. 343

APPEARANCES:

ARTHUR F. GOTTHOLD, Esq., Attorney for Claimant.
JOSEPH G. DEANE, Esq.,
Of Counsel.
CLARENCE C. FOWLER, Esq.,
By MESSRS. T. A. BALL and A. W. MORGAN.
Attorney for Superintendent of Insurance.

ARTHUR W. MORGAN, called as a witness on behalf of the Superintendent of Insurance, being duly sworn, testified as follows: 344

Mr. Ball.—I offer in evidence Chapter 778 of U. S. Statutes at Large, Vol. 33, Part 1, Official Series, Printed by the Government Printing Office.

Referee.—Same is received.

(Marked Exhibit A of Liquidation.)

(Exhibit A is printed herein on page 125, fol. 373.)

Direct-examination by Mr. Ball:

345

Q. Mr. Morgan, you are employed in the Liquidation Bureau of the Insurance Department? A. I am.

Q. How long have you been so employed? A. Three years.

Q. What does your work consist of in the Liquidation Bureau? A. General work as a counselor, preparing cases, etc.

Q. Have you been familiar with the liquidation

of the Casualty Company of America? A. I have.

Q. Are you familiar with the Surety Claim 573, United States of America? A. I am.

Q. Have you gone through the files in the office of the liquidator in the Liquidation Bureau in reference to this claim? A. I have.

Q. Will you state what proceedings have been had in reference to this claim? A. A stipulation was entered into on behalf of the United States and the Liquidator of the Casualty Company of
347 America, withdrawing and dismissing the claim, as the contract on which the bond was given in question had been fully performed, and no actual claim had arisen on behalf of the claimant, United States of America.

Mr. Dean.—I move to strike out that answer as immaterial and irrelevant and having no bearing on the issue in this case.

Referee.—Personally, I do not see what it has. However I will let it stand.

Mr. Ball.—The point in this proposition is to show that the claim of the United States of America based on this same bond
348 was dismissed and disallowed by the order of the court on stipulation. The purpose of this evidence is to show that no liability accrued in favor of the United States as against the sureties in this case, bearing out the statute, which provides for six months' limitation at the time of the beginning of the action.

Q. Was an order entered in this proceeding on that stipulation? A. An order was entered on the first day of July, 1921.

Arthur W. Morgan for Superintendent of Insurance—Direct—Cross. 349

Q. In this proceeding? A. In this proceeding, dismissing and disallowing the claim.

Superintendent of Insurance Rests.

Cross-examination by Mr. Dean:

Q. That was the claim of the United States? A. That was the claim of the United States filed on the bond on account of which claim this hearing is on today. This claim was based on this bond on which the United States filed a claim.

Q. The reason why this stipulation was made 350
was because the contract having been completed, the United States had no claim, was it not? Yes or no? A. The contract had been completed and was part of the bond, and the contract had been fully carried out, and consequently no claim has arisen under the bond with the United States.

Q. Of course, this stipulation was entered into between the attorneys representing the United States and the attorneys representing the Surety Company liquidation? A. It was.

Q. Were there other parties to this stipulation, except the United States and the liquidating bureau? A. No.

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Both sides rest.

Hearing closed.

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Claimant's Exhibit 1.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

UNITED STATES OF AMERICA, to the use of JOHN A. ROWE CUT STONE COMPANY, *vs.* 353 CASUALTY COMPANY OF AMERICA, *et al.*	No. 73.

JUDGMENT.

This cause coming on to be heard before the Honorable James E. Boyd, Judge of the District Court of the United States for the Western District of North Carolina, and being heard, and it appearing to the Court that the defendant Casualty Company of America has been duly and personally served by summons on its process agent in the said District in accordance with the statute in such case made and provided; and it further appearing that verified petitions, with verified claims, for material and labor furnished for and used in the construction of the United States Post Office and Court House in Charlotte, North Carolina, have been duly filed in this cause by the creditors hereinafter named; and it further appearing that the defendant Casualty Company of America has neither appeared nor answered in this action, and is in default; and it further appearing that the defendant Casualty Company

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Claimant's Exhibit 1. 355

of America is indebted to the creditors hereinafter named;

Thereupon, this 24 day of August, 1921, it is considered that the plaintiff United States of America recover of the defendant Casualty Company of America, for the use and benefit of the creditors hereinafter named, the following amounts set opposite their respective names, with interest thereon from December 16, 1918, until paid, together with costs of this action.

Bessemer Fire Brick Company	$280.59
Byers Machine Company	85.62
Berry Brothers	36.40
J. Baum Safe & Lock Company	343.49
John Eichleay, Jr., Company	682.04
Fischer & Jirouch Company	611.31
Guilford Lumber Manufacturing Company	1,006.29
Indiana Rubber & Insulated Wire Company	190.23
Harris Granite Quarries Company	45.03
Keasbey & Mattison Company	415.88
John J. Morton Company	117.00
National Lead & Oil Company	167.70
J. N. McCausland & Company	74.19
McKenna Brothers Brass Company	48.80
D. A. Matot	49.40
Pittsburgh Plate Glass Company	278.06
Pittsburgh Clay Products Company	94.85
G. G. Ray & Company	297.73
A. B. Sands & Son Company	881.62
Steward & Romaine Manufacturing Company	34.39
Southern Electric Company	*105.50*
Smith-Wadsworth Hardware Company	18.20
Tennessee Producers Marble Company	4,053.39

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358 Claimant's Exhibit 1.

United Electric Company	202.91
Wisconsin Iron & Wire Works	308.21
J. H. Wearn & Company	54.96
B. F. Withers	96.88
Williams & Shelton Company	22.26
H. F. Watson Company	274.11
Wiggins-Spencer Company	71.73
John M. Scott & Company	1.20
Southern Gypsum Company	502.19
Southwestern Surety Insurance Company	14,062.67
	25,504.89

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And it is further considered that the plaintiff United States of America, for the use and benefit of the aforesaid creditors, have execution for the said recoveries and costs.

The clerk will enter at Charlotte this 21 day of August, 1921.

JAS. E. BOYD,
United States Judge.

By the Court:
A true copy
360 Test

R. L. BLAYLOCK,
[SEAL] Clerk.

361

Claimant's Exhibit 2.

This form of bond is to be used only when two or more corporate sureties desire to be bound severally.

SEVERAL BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, John G. Unkefer & Co., a corporation organized under the laws of the State of Delaware and having executive offices in the City of Minerva and State of Ohio, Principals, and Casualty Company of America, a corporation organized under the laws of the State of New York, and having executive offices in the City of New York and State of New York, and Southwestern Surety Insurance Company, a corporation organized under the laws of the State of Oklahoma, and having executive offices in the City of Durant and State of Oklahoma, Sureties, are held and firmly bound unto the United States of America, the Principals, in the full and just sum of Ninety-six thousand four hundred Dollars, lawful money of the United States, jointly and severally with each Surety as herein specified, and the said Casualty Company of America jointly and severally with said Principals in the sum of Fifty thousand Dollars of said penal sum and no more; and the said Southwestern Surety Insurance Company jointly and severally with said Principals in the sum of Forty-six thousand four hundred Dollars of said penal sum and no more; for the payment of which respective sums, well and truly to be made to the United States, we bind ourselves, our heirs, executors, administrators, successors, and as-

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364 Claimant's Exhibit 2.

signs, in the manner and in the respective sums hereinbefore set forth, firmly by these presents.

The obligors herein expressly agree that, for the purpose of allowing a joint action against any or all of them, and for that purpose only, this bond shall be treated as the joint and several as well as the several obligation of each of the obligors.

The condition of the above obligation is such, that whereas the said Principal entered into a certain contract, hereto attached, with the United
365 States, dated October 1, 1915: *Now*, if the said Principal shall well and truly fulfill all the covenants and conditions of said contract during the original term of said contract or during any extension of said contract term which may be granted on the part of the United States, without notice to said Sureties, or during the life of any guarantee required under said contract, and shall perform all the undertakings therein stipulated by said Principal to be performed, and shall well and truly comply with and fulfill the conditions of and perform all of the work and furnish all the labor and materials required by any and all changes in, or additions to, or omissions from said contract
366 which may hereafter be made, and shall perform all the undertakings stipulated by said Principal to be performed in any and all such changes in, or additions thereto, notice thereof to the said Sureties being hereby waived, and shall promptly make payment to all persons supplying labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise to remain in full force and virtue.

Claimant's Exhibit 2. 367

In Testimony Whereof, the said Principal and Sureties have signed, sealed and delivered this bond this * 4th day of October, A. D. 1915.

Witnesses:
Cora J. Scheidecker
William E. Wood

John G. Unkefer & Co.
By Jno. G. Unkefer,
President.
[corporate seal]

R. H. Jones
A. C. Brennan 368

Casualty Company of America.
By Joseph F. Randall,
Attorney-in-fact.
[corporate seal]

R. H. Jones
A. C. Brennan

Southwestern Surety Insurance Co.
By C. C. Parker,
Attorney-in-fact.
[corporate seal]

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The rate of premium on this bond is $10.00 per thousand. The total amount of premium charged is $1,926.92.

Jos. F. Randall.

(On side:—Eleven revenue stamps.)

370 **Claimants' Exhibit 3.**

CHARLOTTE, N. C., P. O. & CT. H.
Progress Report for the Month of June, 1917.

Building, U. S. Post Office & Court House, at Charlotte, N. C.
Contractor, John G. Unkefer & Co. **Time Limit, June 1st, 1917.**
Approximate Date Building Ready for Occupany August 25th, 1917.

Branch.	Total Value of Branch.	Total Value Completed to Last Report.	Value Completed Since Last Report.
Demolition—Shoring.	$4,250.00	$4,250.00	.....
Excavation	3,940.00	3,940.00	.....
Piling	.....	.....	.....
Footings	1,890.00	1,890.00	.....
Waterproofing — Subdrains	1,200.00	1,173.00	.....
Brickwork	17,725.00	17,650.00	.....
Granite work	2,540.00	2,440.00	.....
Stonework	40,885.00	40,732.00	.....
Concrete	17,344.00	15,784.12	.....
371 Structural steel and iron	15,120.00	15,120.00	.....
Architectural terra cotta	.....	.....	.....
Structural terra cotta	4,800.00	4,690.00	.....
Roof covering	5,123.81	4,973.81	.....
Woodwork	13,253.20	5,257.00	$744.00
Painting and glazing	5,625.00	1,080.00	800.00
Lathing and plastering	8,800.00	7,370.00	400.00
Interior marble, terrazzo, etc.	12,490.00	10,736.03	.....
Ornamental metal ...	9,600.00	2,787.00	425.00
Hardware	6,966.07	1,525.00	800.00
Approaches, curbs, grading, etc.	4,000.00	600.00	150.00
Miscellaneous	940.97	386.03	.....
Plumbing	6,483.36	5,593.36	200.00
Gas piping	755.60	730.00	.....
Heating and ventilating	6,700.00	5,622.25	200.00
Electric work	3,000.00	2,000.00	.....
372 Vacuum system	600.00	500.00	.....
Lighting fixtures ...	.....	.....	.....
Elevators—Lifts	200.00	.....	20.00
Total,	$194,232.01	$156,799.60	$3,739.00

Per Cent Completed.
Last Month . 81.
This Month . 82.5
Normal .....105.

Equipment.
Satisfactory.

Force.
Satisfactory.

Progress.
Work at a standstill. Contractors suspended work June 13, 1917.

Delivery of Materials.
Orn. Iron & Bronze, Bal. of Int. Hardware, Glass, Cotton Sheeting, Int. Finish for Ct. Rm. Int. Doors and frames are required. Some fr't at the Depot.

Samples Overdue.

Sample	Time Overdue

REMARKS, OR INDEPENDENT CONTRACTS.
Mail Hoist practically completed. No lighting fixtures received to date. 17 days delayed this month on account of suspension of work.

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Contract, including additions and deductions.....		$194,232.01
Less value of work not completed.....		33,693.41
		$160,538.60
Less 10 per cent retained	$16,053.86	
Less payment on account.....	141,119.64	157,173.50
		$3,365.10

Amount of payment for month of June, 1917. No Voucher issued.

Alexander Blumberg,
Superintendent of Construction.

TREASURY DEPARTMENT,
Office of Supervising Architect.
Form 3701.

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Liquidator's Exhibit A.

CHAP. 778.—An Act to amend an Act approved August thirteenth, eighteen hundred and ninety-four, entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August thirteenth eighteen hundred and ninety-four, is hereby 374
amended so as to read as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor 375
and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action

376 Liquidator's Exhibit A.

and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said intervenors. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and
377 materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the
378 amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: And

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provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the 380
penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: Provided further, That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at 381
least three successive weeks, the last publication to be at least three months before the time limited therefor."

Approved, February 24, 1905.

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Affidavit of No Opinion.

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of the People of the State of New York, by JESSE S. PHILLIPS, as Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

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STATE OF NEW YORK,
County of New York, } ss.:

ARTHUR F. GOTTHOLD, being duly sworn, deposes and says:

That he is the attorney for the claimant-appellant Southern Electric Company herein; that the Court, in making the order appealed from, wrote

384 no opinion.

ARTHUR F. GOTTHOLD.

Sworn to before me this
7th day of September, 1923.

HELEN A. PARKER,
[SEAL] Notary Public,
New York County No. 172.
New York County Register's No. 4111.

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Stipulation Waiving Certification.

It is hereby stipulated by and between the attorneys herein that the foregoing are true copies of the notice of appeal, the order appealed from, the testimony taken before the Referee, the exhibits admitted in evidence, and of the papers on which the Court acted in making the order appealed from, and certification of them is waived.

Dated, New York, Sept. 7, 1923.

ARTHUR F. GOTTHOLD,
Attorney for Claimant-Appellant 386
Southern Electric Company.

CLARENCE C. FOWLER,
Attorney for Superintendent of
Insurance, Respondent.

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At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on the 7th day of December, 1923.

Present:

Hon. John Proctor Clarke, Presiding Justice.
" Victor J. Dowling,
" Edward R. Finch,
" John V. McAvoy,
Justices.

In the Matter of the Application of THE PEOPLE OF THE STATE OF NEW YORK, by JESSE S. PHILLIPS, Superintendent of Insurance, for an Order to Take Possession of the Property and Liquidate the Business of the Casualty Company of America.

In the Matter of the Claim of THE SOUTHERN ELECTRIC COMPANY, Applt.

ORDER OF APPELLATE COURT OVERRULING PETITION FOR APPEAL

The above named Claimant having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 9th day of November, 1923

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Arthur F. Gotthold in support of said motion, and after hearing Mr. Arthur F. Gotthold for the motion, and Mr. Clarence C. Fowler opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

Enter.

J. P. C.

APPELLATE DIVISION OF THE SUPREME COURT, FIRST JUDICIAL DEPARTMENT

Clerk's Office, County of New York

I, George T. Campbell, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above entitled action or proceeding, and entered in my office on the 7th day of December 1923.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 11th day of February 1924.

George T. Campbell, Clerk. (Seal.)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on the 9th day of November, 1923.

Present:

Hon. John Proctor Clarke, Presiding Justice.
" Victor J. Dowling,
" Edward R. Finch,
" John V. McAvoy,
" Francis Martin,
Justices.

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In the Matter of the Application of THE PEOPLE OF THE STATE OF NEW YORK, by JESSE S. PHILLIPS, Supt. of Insurance, for an Order to Take Possession of Property and Liquidate the Business of the Casualty Company of America.

In the Matter of the Claim of THE SOUTHERN ELECTRIC COMPANY, Applt.

AFFIRMANCE OF ORDER

An appeal having been taken to this Court by the Southern Electric Company, from an order of the Supreme Court, New York County, entered on the 29th day of May, 1923, granting motion of Superintendent of Insurance as liquidator for dismis-al of appellant's claim and said appeal having been argued by Mr. Arthur F. Gotthold, of counsel for the appellant, and by Mr. Torrey A. Ball, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $10 costs and disbursements.

Enter.

J. P. C.

IN SUPREME COURT, APPELLATE DIVISION

CLERK'S CERTIFICATE

I, George T. Campbell, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above entitled action or proceeding, and entered in my office on the 9th day of November, 1923, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 11th day of February, 1924.

George T. Campbell, Clerk. (Seal.)

IN SUPREME COURT OF NEW YORK

CLERK'S CERTIFICATE

Clerk's Office of the Supreme Court of the State of New York for the County of New York

I, James A. Donegan, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County of New York, by virtue of the annexed Writ of Error which was served upon me on the 18th day of February, 1924, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 133 inclusive, contain a true and complete transcript of the record and proceedings used in the Appellate Division of the Supreme Court of the State of New York in and for the First Department, together with the order of the said Appellate Division determining the said appeal, and the order of the said Appellate Division denying leave to appeal to the Court of Appeals of the State of New York, in the proceedings entitled "In the Matter of the Application of the People of the State of New York by Jesse S. Phillips, Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the Casualty Company of America—In the Matter of the Claim of Southern Electric Company" mentioned in said Writ of Error, as the same remains of record and on file in my office; and that annexed hereto is the Bond in Error, the said Writ of Error served upon me, the Petition for said Writ of Error, the Assignment of Errors and Prayer for Reversal, and the Citation to the Defendant-in-Error, with proof of service of the same.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand at my office in the City and County of New York the 18th day of February, 1924.

James A. Donegan, Clerk. (Seal.)

BOND ON WRIT OF ERROR FOR $300—Approved and filed Feb. 11, 1924; omitted in printing

IN SUPREME COURT OF UNITED STATES

WRIT OF ERROR

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of New York before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Southern Electric Company and Francis R. Stoddard, Jr., Superintendent of Insurance of the State of New York as liquidator of the Casualty Company of America (successor of Jesse S. Phillips), wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest, error hath happened to the great damage of the said Southern Electric Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 8th day of February, in the year of our Lord one thousand nine hundred and twenty-four.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

Allowed by Louis D. Brandeis, Associate Justice of the Supreme Court of the United States.

IN SUPREME COURT OF UNITED STATES

In the Matter of the Application of THE PEOPLE OF THE STATE OF NEW YORK, by JESSE S. PHILLIPS, Superintendent of Insurance, for an Order to Take Possession of the Property and Liquidate the Business of the Casualty Company of America

SOUTHERN ELECTRIC COMPANY, Plaintiff-in-Error,

against

JESSE S. PHILLIPS, as Superintendent of Insurance of the State of New York, Defendant-in-Error

PETITION FOR WRIT OF ERROR

Now comes Southern Electric Company, the above named plaintiff-in-error, by Arthur F. Gotthold, its attorney, and says:

1. That on May 4, 1917, upon the petition of Jesse S. Phillips, as Superintendent of Insurance of the State of New York, defendant-in-error herein, an order of liquidation of the Casualty Company of America was entered in the Supreme Court of the State of New York in and for the County of New York, and the said Superintendent of Insurance was appointed Liquidator and proceeded to liquidate the affairs of the said Casualty Company of America. In accordance with orders of the said Court, the plaintiff-in-error herein, Southern Electric Company, duly filed its proof of claim against the Casualty Company of America with the said Liquidator. On July 9, 1921, the said Liquidator filed his report recommending, among other things, that the claim of the plaintiff-in-error herein be disallowed. In August, 1921, the Liquidator made a motion before the Supreme Court of the State of New York in and for the County of New York that this report be confirmed. The plaintiff-in-error herein opposed and objected to the entry of an order confirming this report insofar as it directed the dismissal of its claim, and thereupon by order of the said Court, dated September 2, 1921, the claim of the plaintiff-in-error herein was referred to a Referee to hear and report. Defendant-in-error having duly served and filed his answer to the claim of the plaintiff-in-error herein, evidence was taken before the Referee. He recommended that the claim of the plaintiff-in-error be disallowed and at the same time passed adversely upon the constitutional questions raised by the plaintiff-in-error herein and now set forth in the assignment of errors filed with this petition. Thereafter an order was made and entered in the Supreme Court of the State of New York in and for the County of New York on May 29, 1923, confirming the report of the Referee and ordering the claim of the plaintiff-in-error herein dismissed, and at the same time the said Court also passed adversely upon the said constitutional objections raised by the plaintiff-in-error herein to the dismissal of its claim.

2. That on the 9th day of November, 1923, the Appellate Division of the Supreme Court of the State of New York in and for the First Department made and entered a final order herein in favor of Jesse S. Phillips, Superintendent of Insurance of the State of New York, the defendant-in-error above named, and against Southern Electric Company, plaintiff-in-error above named, which final order unanimously affirmed the aforesaid order of the lower court dismissing the claim of the plaintiff-in-error herein. That on the 7th day of December, 1923, the said Appellate Division of the Supreme Court of the State of New York in and for the First Department made and entered an order denying the motion made by the plaintiff-in-error above named for leave to appeal to the Court of Appeals of the State of New York from the said order of said court. That the records and proceedings in said cause have been remitted to the Supreme Court of the State of New York in and for the County of New York, and that there have been certain errors committed to the prejudice of the said plaintiff-in-error in the said final order and the proceedings had prior thereunto in this cause, all of which will more in detail appear from the assignment of errors which is filed with this petition, and the said Appellate Division of the Supreme Court of the State of New York in and for the First Department being the highest court of the said State of New York in which a decision in this cause could be had without permission of the said court being given to the plaintiff-in-error herein to appeal to the Court of Appeals of the State of New York, which permission was refused the plaintiff-in-error herein as aforesaid,

Wherefore, your petitioner prays that writ of error may issue in its behalf from the Supreme Court of the United States to the Supreme Court of the State of New York for the correction of the errors and reversal of the final order so complained of, that a transcript of the records, proceedings and orders in this cause duly anthen-icated may be sent to the Supreme Court of the United States, that the amount of security which the petitioner shall give and furnish on said writ of error may be fixed, and that your petitioner may have such other and further relief in the premises as may be just and proper; and your petitioner will ever pray, etc.

Dated New York, January 17, 1924.

Arthur F. Gotthold, Attorney for Plaintiff-in-Error, 27 William Street, New York City.

Jurat showing the foregoing was duly sworn to by Arthur F. Gotthold; omitted in printing.

IN SUPREME COURT OF UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

Now comes plaintiff-in-error, and respectfully submits that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. That the Appellate Division of the Supreme Court of the State of New York, First Department, and the Supreme Court of the State of New York in and for the County of New York, contrary to Article IV, Section 1, of the Constitution of the United States, erroneously refused to give full faith and credit to the judgment of the United States District Court of the Western District of North Carolina in favor of the plaintiff-in-error against the Casualty Company of America, of which the defendant-in-error is the Liquidator, and that the said courts erroneously refused to decide that the said judgment precluded defendant-in-error from objecting to the claim of plaintiff-in-error against defendant-in-error herein.

2. That the Appellate Division of the Supreme Court of the State of New York, First Department, and the Supreme Court of the State of New York in and for the County of New York erred in deciding that, by reason of Section 63 (3) of the Insurance Law of the State of New York (Laws of 1909, Chapter 33), the claim of the plaintiff-in-error was contingent and not vested and in dismissing the claim of the plaintiff-in-error herein. That the said courts erred in not holding that Section 63 (3) of the Insurance Law of the State of New York (Laws of 1909, Chapter 33), if the said law prevents the plaintiff-in-error from recovering herein, is unconstitutional because:

(a) It causes an unreasonable classification of the rights of the corporate surety as against a natural surety, and as such is class legislation and violates the Fourteenth Amendment of the Constitution of the United States.

(b) It impairs the obligation of the contract between the United States and Casualty Company of America, out of which spring the rights of the plaintiff-in-error herein and is therefore unconstitutional under Article 1, Section 10, Clause 1, of the Constitution.

(c) It deprives the plaintiff-in-error herein of its vested right under the bond between the United States and the Casualty Company of America, and thus takes property without due process of law and is unconstitutional under the Fourteenth Amendment of the Constitution of the United States.

3. That the Appellate Division of the Supreme Court of the State of New York, First Department, and the Supreme Court of the State of New York in and for the County of New York erred in refusing

to hold that Section 63 (3) of the Insurance Law of the State of New York (Laws of 1909, Chapter 33) is a statute of discharge which has no territorial jurisdiction and which cannot affect the claim of the plaintiff-in-error herein.

4. That the Appellate Division of the Supreme Court of the State of New York, First Department, and the Supreme Court of the State of New York in and for the County of New York erred in refusing to hold that the rights of the plaintiff-in-error arose under the provisions of 33 U. S. Statutes at Large, 778, that said Statute is a Federal Statute, that the decisions of the Federal Courts thereon uphold the claim of the plaintiff-in-error herein, and that it is the duty of the Courts of New York to follow these decisions of the Federal Courts.

5. That the Appellate Division of the Supreme Court of the State of New York, First Department, and the Supreme Court of the State of New York in and for the County of New York erred in refusing to order that the claim of the plaintiff-in-error herein against the defendant-in-error be allowed.

Said plaintiff-in-error prays that the orders aforesaid may be reversed, annulled and altogether held for naught and that it may be restored to all things which it hath lost by occasion of said orders and that its claim herein against the defendant-in-error be allowed.

Arthur F. Gotthold, Attorney for Plaintiff-in-Error, 27 William Street, New York City.

UNITED STATES OF AMERICA, *ss:*

CITATION—In usual form, showing service on Clarence C. Fowler; omitted in printing

Endorsed on cover: File No. 30,154. New York Supreme Court. Term No. 301. Southern Electric Company, plaintiff in error, vs. Francis R. Stoddard, Jr., Superintendent of Insurance of the State of New York, etc. Filed February 28, 1924. File No. 30,154.

Supreme Court of the United States

OCTOBER TERM, 1924 1925

No. 42

SOUTHERN ELECTRIC COMPANY,
Plaintiff-in-Error,

against

JAMES A. BEHA, Superintendent of Insurance of the State of New York, as Liquidator of the Casualty Company of America, (successor to and substituted herein for Francis R. Stoddard, Jr., successor of Jesse S. Phillips).

ERROR TO THE NEW YORK SUPREME COURT

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

ARTHUR F. GOTTHOLD,
Attorney for Plaintiff-in-Error.

THOMAS M. FIELDS,
FRANK J. HOGAN,
ARTHUR F. GOTTHOLD,
WALTER W. GROSS,
of Counsel.

PRINTED IN THE UNITED STATES BY B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

INDEX.

INDEX OF CASES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

SOUTHERN ELECTRIC COMPANY, Plaintiff-in-Error, *against* JAMES A. BEHA, Superintendent of Insurance of the State of New York, as Liquidator of the Casualty Company of America, (successor to and substituted herein for Francis R. Stoddard, Jr., successor of Jesse S. Phillips).	No. 301.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Preliminary Statement.

This is a writ of error allowed by Mr. Justice Brandeis to the Supreme Court of the State of New York to review a final order entered by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, which unanimously affirmed a final order of the New York Supreme Court, New York County, dismissing the claim of the plaintiff-in-error herein, filed against the Casualty Company of America in liquidation (Record, pp. 133, 134-5).

On May 4, 1917, upon the petition of Jesse S. Phillips, the then Superintendent of Insurance of the State of New York, an order was made and entered in the New York Supreme Court, New York County, directing the Superintendent of Insurance and his successors in office to take possession of the property and liquidate the business of the Casualty Company of America, pursuant to Section 63 of the Insurance Law of the State of New York (pp. 6-9). This order recites that the Casualty Company of America is a New York corporation, authorized to transact business under subdivisions II to IX inclusive of Section 70 of the Insurance Law, that it has its principal office in New York County, that it is subject to supervision and examination by the Superintendent of Insurance, that such an examination was had and disclosed that the Company is insolvent and in such a condition that its further transaction of business is hazardous to its policyholders, its creditors and the public (pp. 6-7). The Company consented to the order of liquidation (p. 7, fol. 21).

The material provisions of Section 63 of the Insurance Law (added to Laws 1909, Ch. 33 by Laws 1909, Ch. 300, and amended by Laws 1910, Ch. 634; Laws 1911, Ch. 366; Laws 1912, Ch. 217; Laws 1913, Ch. 29), under which the order of liquidation was made are as follows:

> "*Proceedings against and liquidation of delinquent insurance corporations.* This section shall apply to all corporations * * * to which any article of this chapter is applicable * * *
>
> 1. Whenever any domestic corporation (a) is insolvent; * * * or, (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public * * * the superintendent" (of insurance) "may, the attorney-general representing him, apply to the supreme court or any justice thereof in the judicial district in which the principal office of the

corporation is located for an order directing such corporation to show cause why the superintendent should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require." * * *

"3. If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such corporation, such liquidation shall be made by and under the direction of such superintendent, and his successors in office, who may deal with the property and business of such corporation in their own names as superintendents, or in the name of the corporation, as the court may direct, and shall be vested by operation of law with title to all of the property, contracts and rights of action of such corporation as of the date of the order so directing them to liquidate. The filing or recording of such order in any record office of the state shall impart the same notice that a deed, bill of sale or other evidence of title duly filed or recorded by such corporation would have imparted. The rights and liabilities of any such corporation, and of its creditors, policyholders, stockholders and members, and of all other persons interested in its assets, shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order directing the liquidation of such corporation in the office of the clerk of the county wherein such corporation had its principal office for the transaction of business upon the date of the institution of proceedings under this section." * * *

"7. For the purposes of this section, the superintendent shall have power, subject to the approval of the court, to make and prescribe such rules and regulations as to him shall seem proper."

Section 70 of the Insurance Law, specifying the kinds of insurance permitted to the Casualty Company of America, is also a part of Laws 1909, Ch. 33, and up

to 1917 had been amended by Laws 1909, Ch. 302; Laws 1910, Ch. 637; Laws 1911, Ch. 324; Laws 1912, Ch. 231; Laws 1913, Ch. 304; Laws 1914, Ch. 204; Laws 1915, Ch. 505. The several specified subdivisions permit incorporation for the purpose of making any of the following kinds of insurance:

2. Against injury or death from accidents and disablement from sickness.

3. Against liability for loss or damage to persons or property.

> "4. Guaranteeing the fidelity of persons holding places of public or private trust. Guaranteeing the performance of contracts other than insurance policies; guaranteeing the performance of insurance contracts where surety bonds are accepted by states or municipalities; executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed;" * * * (This is the kind of insurance directly involved in the instant case). Indemnifying banks, etc., against loss of securities.

4-a. Credit insurance.

5. Burglary, theft or forgery.

6. Glass breakage.

7. Boiler explosion.

8. Upon lives or against theft of animals.

9. Loss of or damage to automobiles.

Pursuant to the order of liquidation the Superintendent of Insurance immediately took possession of the business and affairs of the Casualty Company of America and proceeded to liquidate its affairs (pp. 14-15). In accordance with further orders and notice (p. 15), the plaintiff-in-error duly filed its proof of claim with the liquidator (pp. 9-12).

On July 11, 1921, the liquidator filed his report (pp. 13-50), recommending among other things that this claim

be disallowed on the ground that the liability of the Casualty Company of America to the plaintiff-in-error was contingent on the date of liquidation, to wit, May 4, 1917 (pp. 32-33, 38, 50), and in August, 1921, the liquidator made a motion before the Supreme Court in and for the County of New York, that this report be confirmed (pp. 51-57). On the return day of this motion the plaintiff-in-error, with a large number of other claimants similarly situated, opposed and objected to the entry of an order confirming this report in so far as the report directed the dismissal of its claim (pp. 58-64), and thereupon by order of the Supreme Court, dated September 2, 1921, this claim, among others, was referred to William W. Pellet, Esq., as Referee to hear and report (pp. 65-69). In accordance with the provisions of this order of reference (p. 69), the new Superintendent of Insurance (Francis R. Stoddard, Jr., Esq.) duly served his answer to the claim of the plaintiff-in-error (pp. 70-74). Evidence was then taken before the Referee (pp. 96-127), who recommended that the claim be disallowed (pp. 80-84), for reasons set forth in a brief opinion (pp. 78-79). Upon notice (pp. 85-86) the Supreme Court, by Honorable James O'Malley, one of its Justices, dismissed and disallowed the claim of the plaintiff-in-error (pp. 3-5), no opinion being written (p. 128), and a formal order to that effect was made and entered May 29, 1923 (p. 3). At the same time the Court passed upon findings of fact and conclusions of law proposed in writing by the plaintiff-in-error (pp. 87-92), refusing to find certain of them. The plaintiff-in-error duly filed exceptions to the refusals to find (pp. 93-95).

Thereupon the plaintiff-in-error duly appealed to the Appellate Division of the Supreme Court, First Department, from the order dismissing and disallowing its claim (pp. 1-2). After argument the Appellate Division affirmed said order with costs (p. 131). The decision is

officially reported in 207 App. Div. (N. Y.), 842, as follows:

> "In the Matter of the Application of the People of the State of New York, by Jesse S. Phillips, Superintendent of Insurance, Respondent, for an Order to Take Possession of the Property and Liquidate the Business of the Casualty Company of America. In the Matter of the Claim of the Southern Electric Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Present—Clarke, P. J., Dowling, Finch, McAvoy and Martin, J. J."

Thereupon plaintiff-in-error moved for leave to appeal to the Court of Appeals and thereafter the Appellate Division denied said motion with costs (p. 130), 207 App. Div. (N. Y.), 893. The plaintiff-in-error having thus exhausted its remedies in the Courts of New York (p. 135) filed its petition for this writ of error (pp. 134-135, 136-137), to review the constitutional questions duly and seasonably raised in the course of the proceeding and decided adversely to it in the State Court (pp. 134, 112-114, 91-92, 79, 82-83).

Subsequently Mr. James A. Beha was appointed Superintendent of Insurance of the State of New York in the place of Mr. Francis R. Stoddard, Jr., and pursuant to stipulation between the parties, was, on March 16, 1925, substituted as defendant-in-error herein.

Facts.

John G. Unkefer & Co., a Delaware corporation, on October 1, 1915, entered into a contract with the United States to erect a post office and court house building in Charlotte, North Carolina, and pursuant to 33 U. S. Statutes at Large, 778, (which statute is set forth as Liquidator's Exhibit A at pp. 125-27 of this record),

furnished a bond, dated October 4, 1915, in the sum of $96,000 for the due performance of its contract and the prompt payment of all persons supplying labor, etc., thereunder (pp. 87-88, 102-3, 105, 121-3). The Casualty Company of America and the Southwestern Surety Insurance Company were the sureties on this bond, the former being liable for $50,000 or 52%, and the latter for $46,000 or 48% (pp. 88, 110). This bond is set forth as Claimant's Exhibit 2 at pp. 121-3.

In the course of the construction of the post office, Unkefer & Co. made various contracts for supplies and materials, including a contract with the plaintiff-in-error for certain electrical supplies amounting to a total of $201.23 (p. 88). The Court refused to find when these supplies were contracted for (p. 88) but we contend that the evidence clearly shows that it was early in 1917 and previous to May 4, 1917 (pp. 11-12, 97). Exception was duly taken to the refusal of the Court so to find (pp. 93-94).

These supplies were to be used in this post office (p. 88, fol. 263). They were delivered by the plaintiff-in-error and put into the post office building in North Carolina before the middle of June, 1917 (Finding of Fact V, p. 88; pp. 100, 101, 106-7, 109-110), when Unkefer & Co. became insolvent and ceased work (pp. 89, 98, 112). They were never paid for by Unkefer & Co. (pp. 88-9, 98, 109-110). The Court refused to find that the electrical supplies were delivered by the plaintiff-in-error to John G. Unkefer & Co. before May 4, 1917, the date of the order of liquidation of the Casualty Company of America (p. 88), to which the plaintiff-in-error took an exception (p. 94). We contend that the evidence clearly shows that more than three-quarters of the supplies were delivered to Unkefer & Co. before May 4, 1917, under a pre-existing contract (pp. 11-12, 108, 124).

Upon the insolvency of Unkefer & Co. the plaintiff-in-error called upon the sureties for the payment of its bill for $201.23 for the supplies furnished by it theretofore for this post office. The Southwestern Surety Insurance Company paid $97.38, being 48% thereof, as its liability under the surety bond (pp. 89, 109-110). The amount of the claimed liability of the Casualty Company of America, to wit, 52% thereof, being the sum of $105.50, was not paid (p. 89, Finding X). (It should be observed that the plaintiff-in-error claims only that it is entitled to the last named sum, and not to $201.23, the total amount of the supplies, and the amount originally claimed before payment was made by the Southwestern Surety Company.)

Thereupon suit was duly brought against the Casualty Company of America in the United States District Court for the Western District of North Carolina and a judgment in the sum of $105.50, being the amount of the claim of the plaintiff-in-error and being the balance due it for electrical supplies installed in this post office, was duly recovered in that action in favor of the plaintiff-in-error on August 24, 1921 (Finding of Fact XI, p. 89; p. 99; pp. 109-110). This judgment is printed in full as Claimant's Exhibit 1 at pp. 118-120. The Court found that it was duly recovered against the Casualty Company (fol. 267, p. 89) and the Superintendent of Insurance took no exception to this finding.

It should be noted that the claim considered in this appeal involves practically the same state of facts as twenty-six other claims of other claimants which have arisen in connection with the same post office contract at Charlotte, N. C. (pp. 60-61). Final action on these claims has been suspended pending the decision of this writ of error.

The questions arising under the Constitution of the United States were clearly and specifically raised in the

State Courts (pp. 91-2, 112-4, 82-3, 79), and are now raised in this Court.

The questions involved are set forth in detail in the specification of errors, *infra*. Briefly, they are:

1. The refusal to give full faith and credit to the judgment of the United States District Court of the Western District of North Carolina, in violation of Article IV, Section 1, of the Constitution, and the Act of Congress of May 26, 1790, ch. 11; 1 St. L. 122; R. S. §905.

2. The refusal to hold that Section 63 (3) of the Insurance Law of the State of New York is unconstitutional, if construed to defeat recovery by the plaintiff in error, in that, if so construed:

(a) It causes an unreasonable classification of the rights of the corporate surety as against a natural surety, in violation of the Fourteenth Amendment.

(b) It impairs the obligation of the contract between the United States and Casualty Company of America in violation of Article I, Section 10, Clause 1, of the Constitution.

(c) It deprives the plaintiff in error of its vested rights under the bond between the United States and the Casualty Company of America, and thus takes property without due process of law, in violation of the Fourteenth Amendment.

3. The refusal to hold that Section 63 (3) of the Insurance Law of New York is a statute of discharge which has no extra-territorial effect on the validity of the claim of the plaintiff in error acquired under the Laws of the United States and fixed by the Courts of the United States.

4. The refusal to hold that the rights of the plaintiff in error arose under the provisions of 33 U. S. Statutes at Large, 778, and to recognize the

duty of the Courts of New York to follow the decisions of the Federal Courts as to such Statute.

5. The refusal to allow the claim of the plaintiff in error.

The case now comes before this Court on writ of error pursuant to the provisions of the second subdivision of Section 237 of the Judicial Code.

This practice and the practice in the Courts of the State of New York are briefly discussed in Point I, *infra*.

Specifications of Error.

The specifications of error upon which the plaintiff in error relies are as follows:

1. That the Appellate Division of the Supreme Court of the State of New York, First Department, and the Supreme Court of the State of New York in and for the County of New York, contrary to Article IV, Section 1, of the Constitution of the United States, erroneously refused to give full faith and credit to the judgment of the United States District Court of the Western District of North Carolina in favor of the plaintiff-in-error against the Casualty Company of America, of which the defendant-in-error is the Liquidator, and that the said courts erroneously refused to decide that the said judgment precluded defendant-in-error from objecting to the claim of plaintiff-in-error against defendant-in-error herein.

2. That the Appellate Division of the Supreme Court of the State of New York, First Department, and the Supreme Court of the State of New York in and for the County of New York erred in deciding that, by reason of Section 63 (3) of the Insurance Law of the State of New York (Laws of 1909, Chapter 33), the claim of the plaintiff-in-error was contingent and not vested and in dismissing the claim of the plaintiff-in-error herein. That the said courts erred in not holding that Sec-

tion 63 (3) of the Insurance Law of the State of New York (Laws of 1909, Chapter 33), if the said law prevents the plaintiff-in-error from recovering herein, is unconstitutional because:

(a) It causes an unreasonable classification of the rights of the corporate surety as against a natural surety, and as such is class legislation and violates the Fourteenth Amendment of the Constitution of the United States.

(b) It impairs the obligation of the contract between the United States and Casualty Company of America, out of which spring the rights of the plaintiff-in-error herein and is therefore unconstitutional under Article I, Section 10, Clause 1, of the Constitution.

(c) It deprives the plaintiff-in-error herein of its vested right under the bond between the United States and the Casualty Company of America, and thus takes property without due process of law and is unconstitutional under the Fourteenth Amendment of the Constitution of the United States.

3. That the Appellate Division of the Supreme Court of the State of New York, First Department, and the Supreme Court of the State of New York in and for the County of New York erred in refusing to hold that Section 63 (3) of the Insurance Law of the State of New York (Laws of 1909, Chapter 33) is a statute of discharge which has no extra-territorial jurisdiction and which cannot affect the claim of the plaintiff-in-error herein.

4. That the Appellate Division of the Supreme Court of the State of New York, First Department, and the Supreme Court of the State of New York in and for the County of New York erred in refusing to hold that the rights of the plaintiff-in-error arose under the provisions of 33 U. S. Statutes at Large, 778, that said Statute is a Federal Statute, that the decisions of the Federal Courts thereon uphold the claim of the plaintiff-in-error herein, and that it is the duty of the Courts of New York to follow these decisions of the Federal Courts.

5. That the Appellate Division of the Supreme Court of the State of New York, First Department, and the Supreme Court of the State of New York in and for the County of New York erred in refusing to order that the claim of the plaintiff-in-error herein against the defendant-in-error be allowed.

(Note: There is an obvious typographical or clerical error in the third line on page 137 of the record. The word "territorial" should be "extra-territorial." The point was raised in proper language in Point IV of our brief in the Appellate Division and Point IV of our brief submitted to the Referee.)

The reasons for assigning these specifications as error follow.

POINTS.

I.

The writ of error is properly before this Court.

(a) *The plaintiff in error exhausted its remedies in the Courts of the State of New York.*

The appeal (Record, pp. 1-2) from the order of the Supreme Court (pp. 3-5) was taken to the Appellate Division of the Supreme Court as a matter of right.

Appeals to the Court of Appeals are regulated by statute. The relevant law is contained in Section 588 of the Civil Practice Act, which, so far as applicable, reads as follows:

> "*Sec. 588. Jurisdiction of the court of appeals in civil actions and proceedings.* From and after the thirty-first day of May, nineteen hundred and seventeen, the jurisdiction of the court of appeals in civil actions and proceedings shall be confined

to the review, upon appeal, of an actual determination made by an appellate division of the Supreme Court in either of the following cases, and no others:

1. An appeal may be taken as of right to said court from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding where is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

2. An appeal also may be taken as of right to said court from an order of the appellate division granting a new trial on exceptions where the appellants stipulate that, upon affirmance, judgment absolute shall be rendered against them.

3. An appeal also may be taken from a determination of the appellate division of the supreme court in any department, other than from a judgment, or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the court of appeals shall certify to the appellate division its determination upon such questions.

4. An appeal also may be taken from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding, but which is not appealable as of right under subdivision one of this section, where the appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or where, in case of the refusal so to certify, an appeal is allowed by the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

* * * * * *"

This section is a modification of Section 190 of the former Code of Civil Procedure which was in effect until 1917. That section allowed "appeals * * * as of right * * * from judgments or orders finally determining actions of special proceedings." It will be noted that while the former law is broader than the present, the words "finally determining actions or special proceedings" are the same, and accordingly the decisions of the highest Court of the State, construing these words in the former statute are applicable to the present law.

The Court of Appeals of New York has uniformly held that an order *finally* disposing of a claim of a character such as is involved in the instant case is not an order "finally determining an action or special proceeding" within the meaning of the Statute.

The leading case on the subject is *People* v. *American Trust Co.*, 150 N. Y., 117 (1896). This was an appeal from an order of the Appellate Division directing the receiver of the defendant to pay a claim held by petitioner against the defendant. An action had been originally brought in the name of the people to dissolve the defendant trust company and appoint a receiver. After discussing the New York law applicable to the dissolution of corporations, the Court in arriving at its decision that the order was an intermediate one and not appealable as of right to the Court of Appeals, pointed out that the petitioner had become a party to the original action and proved his claim therein, and that such procedure could not be regarded as a special proceeding because the original prosecution was not commenced thereby. The Court further pointed out that it was by virtue of the pendency of this previous action that the petitioner was authorized to appear and ask for an order directing payment of his claim, and that such order was a mere incident or step in the progress of the original action and in order to secure its ultimate purpose—that is, dissolution of the

corporation. The Court added that as a practical matter any other solution would involve a series of appeals to the Court of Appeals.

In *New York Security Co.* v. *Saratoga Gas and Electric Co.*, 156 N. Y. 645 (1898), the question arose whether the order of the Appellate Division, directing a foreclosure receiver to pay moneys over to a sequestration receiver, was a final order in a special proceeding. The Court in holding that it was not cited *People* v. *American Trust Co., supra.*

See also *Guaranty Trust* v. *P. R. N. E. R. R.*, 160 N. Y., 1 (1899), holding that an order determining the petition of a claimant for payment from a receiver appointed in a pending action for the foreclosure of a corporate mortgage is not a final order in a special proceeding.

People v. *American Trust Co., supra,* is cited with approval in *Knickerbocker Trust Co.* v. *Oneonta R. R.*, 197 N. Y., 391 (1910), and in several subsequent cases.

It should be observed in passing that in both the *Empire State Surety Co.* case, 216 N. Y., 273, and the *Metropolitan Surety Co.* case, 211 N. Y., 107, discussed *infra,* permission was asked of the Appellate Division to appeal to the Court of Appeals.

Accordingly the only right afforded plaintiff in error was the right to request of the Appellate Division permission to appeal to the Court of Appeals pursuant to subdivision 3 of Section 588. This application having been duly made and denied (Record, pp. 130, 132, 135) our remedies in the State Courts were exhausted.

The jurisdiction conferred on the Court of Appeals by Section 588 is further limited by Section 589 which, among other things, provides that no appeal shall be taken to the Court of Appeals in any civil action or proceeding commenced in any court other than the Supreme Court, Court of Claims, County Court or Surrogate's Court, unless the Appellate Division of the Supreme Court allows such appeal.

It thus might easily happen that a final judgment of one of the courts of limited and inferior jurisdiction (such as the Municipal Court of the City of New York) might involve questions arising under the Federal Constitution and yet the Court of Appeals would have no jurisdiction to review unless the Appellate Division granted leave. In fact, it is possible that such case might never get to the Appellate Division.

(b) Irrespective of the definition given to "final" judgments and orders by the Court of Appeals of New York, it is obvious that the order of the New York Supreme Court here involved, disallowing the claim of the plaintiff in error and refusing it participation in the funds in the hands of the Superintendent of Insurance, is final within the meaning of the Judical Code and the decisions of this Court:

Ex parte Tiffany, 252 U. S., 32, and authorities cited at pages 36 and 37;

Arnold v. *United States,* 263 U. S. 427, 434;

Missouri v. *Taylor,* 69 L. Ed. (U. S.), Adv. Op., p. 78;

Bostwick v. *Brinkerhoff,* 106 U. S., 3:

> "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already entered." (Citing authorities.)

(c) The cause is properly here on writ of error under Section 237 of the Judicial Code as amended.

II.

The courts of New York erred in refusing to give full faith and credit to the judgment of the United States District Court for the Western District of North Carolina. Said judgment precluded the Superintendent of Insurance and the courts from disallowing the claim of the plaintiff in error.

The rights of plaintiff in error arise under Article 4, Section 1, of the Constitution of the United States and the Act of Congress of May 26, 1790, ch. 11; 1 St. L. 122; R. S. §905.

The judgment of the United States District Court for the Western District of North Carolina was competently rendered under the authority of 33 U. S. Statutes at Large, 778 (pp. 125-7):

> "* * * the person or persons supplying the contractor with labor and materials shall be * * * authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use against such contractor and his sureties, and to prosecute same to final judgment and execution."

United States v. *Congress Construction Co.*, 222 U. S., 199.

The constitutional requirement of full faith and credit extends to the case of a judgment of a Federal Court:

Embry v. *Palmer*, 107 U. S., 3, 10;
Deposit Bank v. *Frankfort*, 191 U. S., 499;
Manufacturing Co. v. *Riverdale Mills*, 198 U. S., 188.

The judgment taken by the default of the defendant is just as conclusive an adjudication between the parties of whatever is essential to support it as one rendered after answer and contest:

Last Chance Mining Co. v. *Tyler Mining Co.*, 157 U. S., 683, 691;
Pringle v. *Woolworth*, 90 N. Y., 502, 509.

The courts of New York may not impeach this judgment on the ground that, under New York law, they would have given a different and contrary judgment. The judgment is not subject to review or re-examination, as to any point of law or fact settled by it, by the courts of New York:

Marshall, C. J., in *Hampton* v. *McConnel*, 3 Wheat., 234, holding:

> "The judgment of a State court should have the same credit, validity, and effect in every other court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court of the United States."

See also:

Fauntleroy v. *Lum*, 210 U. S., 230;
First National Bank v. *Fourth National Bank*, 89 N. Y., 412;
Woodhouse v. *Duncan*, 106 N. Y., 527.

Heiston v. *National City Bank*, 280. Fed. R., 525 (Court of Appeals, Dist. of Columbia, 1922):

> "It follows from the foregoing summary of the law that, with complete jurisdiction of the subject-matter and the parties, a judgment shall be ac-

corded the same faith and credit in every court within the United States as it has by the law and usage of the courts in the state or territory where it was originally rendered; and that is true, though the cause of action upon which the judgment is based is against the law and public policy of the state or territory in which enforcement is sought."

And the judgment in favor of the plaintiff in error in the United States District Court for the Western District of North Carolina is valid and operative, even though obtained in an action begun after the Insurance Liquidator was appointed.

In *Pringle* v. *Woolworth*, 90 N. Y., 502, the court held, at page 510:

"It was also claimed by the defendant that having been appointed receiver of the Homestead Fire Insurance Company before the commencement of the suit in Pennsylvania, no action could, after such appointment, be maintained against the company upon the policy. The only evidence as to the character of the receivership of the defendant, is found in the admission in the answer of the allegation in the complaint, that the defendant Woolworth was duly appointed receiver of the estate, property and effects of the Homestead Fire Insurance Company. It was not claimed on the trial, nor is it now claimed, that the company has been dissolved, and no such inference arises upon the evidence in the case. Upon this state of facts, it is clear that the plaintiff was not debarred by the appointment of a receiver of its property and effects, from maintaining an action against the corporation on the contract of insurance. Until judgment dissolving the corporation and ending its existence, the contract could be enforced against the company as well after as before the appointment of the receiver."

Accord, *People* v. *Commercial Alliance Life Ins. Co.*, 5 App. Div. (N. Y.), 273 (affirmed on opinion below in 151 N. Y., 640), in which the court said at page 274:

> "On this application to establish this claim, we think that judgment (of a Michigan court) was competent evidence before the referee to establish the existence of the indebtedness of the corporation in this proceeding (similar to the one at bar) and that the referee was, therefore, justified in accepting the judgment as evidence of the fact of the existence of the claim against the corporation." (Parentheses ours.)

It is a fact that the order of the Supreme Court for the County of New York, May 4, 1917 (pp. 6-9), appointing the liquidator, was not an order dissolving the Casualty Company. It is an order appointing a temporary receiver or liquidator. The injunction contained in the said order was not binding on the plaintiff in error.

People v. *Commercial etc., Co.* (*supra*):

> "The action in which the receiver was appointed was brought to dissolve the corporation, but such corporation could only be dissolved by the final judgment of the court, and the order appointing the temporary receiver had no effect upon the life of the corporation or its ability to sue or liability to be sued. * * * There was nothing to prevent a creditor who had an action pending against the corporation from proceeding in that action, unless he was restrained by order of the court from doing so; and such a restraining order would not affect him unless it was served upon him."

Moreover the liquidator is in no position to attack the validity of the judgment. The Court specifically found as a fact "that in an action brought against the Casualty Company of America in the United States District Court, for the Western District of North Carolina, a judgment was *duly* recovered by the Southern Electric Company,

the claimant herein, against the Casualty Company of America in the sum of $105.50 for the balance due and owing to the claimant herein for the said electric supplies." (p. 89. Italics ours.) No exceptions were taken to this finding by the liquidator and he is therefore bound thereby. He cannot now attack the jurisdiction of the Court rendering the judgment as to either subject-matter or parties. Since this is so the State Court erred in refusing to find as conclusions of law that the said judgment is entitled to full faith and credit under the provisions of Article IV, Section I, of the Constitution of the United States (p. 90) and that the said judgment established the claim of the plaintiff in error in the sum of $105.50 against the funds in the possession of the liquidator (p. 90), to which refusals exceptions were duly filed (p. 94).

That the judgment was obtained in the proper forum under the Federal Statute is not disputed, and the recitals in and the findings of the judgment (pp. 118-120), must of course be accepted as true.

The learned Referee (p. 78), and presumably the Supreme Court and the Appellate Division of the Supreme Court, dismissed and disallowed the claim of plaintiff in error under the authority of *Matter of Empire State Surety Company*, 216 N. Y., 273, and *People* vs. *Metropolitan Surety Company*, 211 N. Y., 107. It is submitted that these authorities do not justify the action of the Courts in disallowing the claim, based as it is on a breach of a bond given under a Federal Statute and ripened into a Federal judgment under a Federal Statute. Such a construction of Section 63 (3) of the Insurance Law (cited in full, *supra*, at page 3) is not permissible for it would deny full faith and credit to the judgment.

Here, as the evidence shows, at least three-quarters of the supplies furnished by the plaintiff in error to

Unkefer & Co. for the post office at Charlotte, N. C., were delivered before May 4, 1917 (pp. 11-12, 108, 124). The United States Supreme Court can find this as a fact, despite the refusal of the New York courts so to find, in as much as otherwise a Federal right will be denied. See *Aetna Life* v. *Dunken*, 69 L. Ed. (U. S.) Adv. Op. pp. 137, 140, and cases cited. Thus the right of plaintiff in error to recover from Unkefer & Co. or its surety was fixed on that date. The bond provided for prompt payment to all persons supplying labor or material in prosecution of the work contemplated by the contract. (p. 122). On May 4, 1917, the supplies had been furnished by the plaintiff in error and Unkefer & Co., the contractor, had not paid for them. Every condition which would render the Casualty Company of America liable on its bond had been performed by the plaintiff in error and there was no further act upon its part to be done.

It is hardly necessary to cite all of the New York cases dealing with claims of the general character here involved. The following, it is believed, will be sufficient:

People vs. *Metropolitan Surety Co.*, 205 N. Y., 135, was a case where in an action for dissolution a permanent receiver was appointed. There was outstanding an undertaking to dissolve an attachment and to pay "any judgment which my be recovered". *After dissolution* judgment was recovered in favor of the person holding the bond. It was held that the claim was non-existent and only contingent at the time of the dissolution of the company. At page 41 the court quotes *People* v. *American Loan & Trust Co.*, 172 N. Y., 371, 377:

> "A corporation is created by edict of the legislature and dies at its command. Knowledge is imputed to all who deal with it that when it suspends business the law takes charge of its affairs, liquidates its debts, converts its assets and distributes the proceeds among its creditors. Those who contract with it do so 'with knowledge of the

> statutory conditions, and these must be deemed to have permeated the agreement and constituted elements of the obligation'." Citing cases.

In *People* v. *Metropolitan Surety Co.*, 211 N. Y., 107, the question involved was the right of a creditor under a bond given to the United States. The court, at page 113, recognized the fact that the Statute is as perfectly binding on the principal and surety as if set forth in the bond, citing *McCracken* v. *Hayward*, 2 How. (U. S.), 609. It was held, however, that as no judgment had ever been recovered by the plaintiff under the terms of the Statute the claim should be disallowed.

It should be observed that in the last cited *Metropolitan Surety* case the claim of the supply creditor had never been reduced to judgment in accordance with the terms of the Federal Statute, as it has been in the case at bar. As the court said on page 117:

> "Whatever right of action was in the claimant or liability on the part of the surety was conditioned upon the use of the statutory remedy. Divorced from that remedy the right and the liability are non-existent. The claimant should have conformed with the provisions of the statute and obtained in the statutory action and presented to the receiver a judgment establishing the validity and amount of his claim. His claim as presented was conditional and not absolute, and its allowance was error. (*People* vs. *Metropolitan Surety Co.*, 205 N. Y., 135.)"

In *Matter of Empire State Surety Co.*, 214 N. Y., 553, the question of contingent and fixed claims was further discussed and finally in *Matter of Empire State Surety Co.*, 216 N. Y., 273, the question was considered as to the rights of judgment creditors under 33 U. S. Statutes at Large, Chapter 778. A distinction was there made between judgments obtained in actions commenced be-

fore the order of liquidation and judgments obtained in actions commenced after the order of liquidation. The first class of judgments were allowed as proper claims and the second class were disallowed. It does not appear that the constitutional questions involved were raised or were considered by the court. It is therefore submitted that the rule adopted by the New York Supreme Court in this case, based on the cited decisions of the Court of Appeals of New York, does not justify the disallowance of the claim based on the constitutional rights herein alleged as errors.

The plaintiff in error having properly used the statutory remedy and reduced its claim to judgment and duly presented it to the Liquidator of the Casualty Company of America at an early opportunity, and the actual work on which judgment was rendered having been rendered by the plaintiff in error before the order of liquidation, it is contended that it has done everything necessary to establish its claim. The court therefore erred in refusing to find proposed conclusions of law of the plaintiff in error numbered 3, 4, 5 (p. 90) to the effect that the claim was entitled to be recognized as valid under the terms of the bond and that it was vested and not contingent on May 4, 1917, the date of the order of liquidation of the Casualty Company of America, and the exceptions to these refusals to find (pp. 94-5) should be upheld and the findings made.

The judgment alone entitles the plaintiff in error to have its claim allowed.

See *Wm. Filene's Sons* v. *Weed*, 245 U. S., 599, 602.

III.

It was error to hold that the claim herein is not valid by reason of Section 63 (3) of the Insurance Law of the State of New York. So construed said section is unconstitutional as causing an unreasonable classification of the rights of a corporate surety as against a natural surety.

The Constitution of the United States, Fourteenth Amendment, provides that "No State shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws". It has been interpreted to mean that a state statute must be of such nature "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances". (*Connelly* vs. *Union Sewer Pipe Company,* 184 U. S., 540, 559.) In the same case it was said at page 558 that "The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but, if by their necessary operation, its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void".

It is well recognized in the law that creditors of a natural surety are not foreclosed from prosecuting their right to a proportionate share of their claims by the bankruptcy of the surety before the absolute fixing of his liability. In *Moch* vs. *Market Street National Bank,* 107 Fed. R., 897, it was held that the liability of a bankrupt indorser of commercial paper, which did not become absolute until after the filing of the petition, was a debt provable against his estate after the liability became

fixed and within the time limited for filing claims. See also *Central Trust* vs. *Chicago Auditorium*, 240 U. S., 581.

If the New York law attempts to free corporate sureties from the operation of this rule, then, obviously, a classification is created between corporate sureties and natural sureties. And yet there is no "reasonable basis" for this classification, within the cases holding such legislation constitutional if there be a possible reason which can justify the classification. For the nature and business of suretyship is controlling on the question; and that nature, it is clear, is that the surety operates for the protection of the assured with whom he has contracted to furnish such protection. Moreover, the business of suretyship is one that is essential and of importance to the community. It is not one which public policy requires to be carried on by corporate organizations solely. Since, therefore, the policy of the state permits the individual surety to compete with the corporate surety, and recognizes both as legitimate expressions of public need and practice, it has, by this, its own attitude, precluded itself from asserting a need for legislation which gives greater protection and immunity to the corporate surety.

The plaintiff in error is in a position to take advantage of any such unconstitutionality in the New York law. For, although the initial discrimination of the section is between the corporate and the natural surety, nevertheless the operation of this discrimination results in a further discrimination between those who deal with corporate sureties and those who deal with natural sureties. And as the plaintiff in error is one which has dealt with the corporate surety and is prejudiced in its rights on a point wherein the customer of the natural surety will be protected, it is one which, being injured by the operation of the class-law, may protest against its invalidity. We come within the doctrine of *Hendrick* vs.

Maryland, 235 U. S., 610, 621, wherein it is held that "only those whose rights are directly affected can properly question the constitutionality of a state statute and invoke our jurisdiction thereto".

The court therefore erred in refusing to find the proposed conclusion of law numbered 6-a (p. 91) to the effect that if Section 63 (3) of the Insurance Law of the State of New York prevents the claim of the plaintiff in error from being allowed it causes an unreasonable classification of the rights of the corporate surety as against the natural surety, and as such is class legislation and violates the Fourteenth Amendment of the Constitution of the United States, and plaintiff in error's exception to this refusal to find (p. 95) should be upheld under Assignment of Error, 2 (a) at page 136.

IV.

It was error and unconstitutional to interpret Section 63 (3) of the Insurance Law so as to destroy the rights of the plaintiff in error under the bond between the Casualty Company of America and the United States and under the contract between the United States and the Casualty Company of America. The errors assigned numbered 2 (b) and 2 (c) should be sustained.

The plaintiff in error is a party to, and beneficiary under, the bond.

> 33 *U. S. Statutes at Large*, 778;
> *Lawrence* vs. *Fox*, 20 N. Y., 268.

Its rights under this contract arose uncontrolled by Section 63 (3) of the Insurance Law, which, at the inception of the bond in the City of Washington, was inapplicable and inoperative.

In *Mutual Life Insurance Co. of New York* vs. *Cohen*, 179 U. S., 262, the court considered that provision of the New York Statutes which set forth that "No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or received, by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided". It held that the statute does not apply to or control such a policy issued by a corporation of New York in another state in favor of a citizen of the latter; and that in such case the rights of the parties are measured by the terms of the contract.

The case is on all fours with the instant case; for here also a New York Statute seeks to control, by the operation of a condition subsequent not expressed in the contract and not contemplated by the parties, the expressed intent of the parties to a contract made in another jurisdiction.

Since, therefore, the contract or bond matured without being affected by Section 63 (3) of the Insurance Law, it must be given the full effect of a contract.

In *People* vs. *Otis*, 90 N. Y., 48, the court, speaking of an act relating to negotiable instruments, held at page 52:

> "The section violates not only the Federal Constitution, but also the provision of the State Constitution that no person shall be deprived of life, liberty or property without due process of law. Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision, and a legislative declaration that, upon the publication of notice, a negotiable instrument shall be no longer transferable, is not due process of law, working a forfeiture of the right given by the contract."

The case involved subsequent legislation. Nevertheless, it is, within its definition of due process, authority for the position of plaintiff-in-error. For the contract of plaintiff-in-error has been shown to be immune from the effect of even antecedent legislation such as Section 63 (3) of the Insurance Law; and plaintiff-in-error is therefore entitled to all the "attributes" of its right, one of which clearly is the enforcement of the right.

The court therefore erred in refusing to find the proposed conclusions of law numbered 6-b and 6-c (p. 91).

V.

Section 63 (3) of the Insurance Law of the State of New York is in reality a statute of discharge. It has no extra-territorial operation and therefore cannot affect the validity of the claim of plaintiff-in-error, as asserted in Assignment of Error 3 at pages 136-7.

In *Baldwin* vs. *Hale,* 1 Wallace, 223, the payee, a Vermont citizen, of a note made in Boston, by a Massachusetts citizen, sued the maker in a Federal court. The maker pleaded his discharge under the insolvency laws of Massachusetts. The court on appeal denied the plea, holding at page 234:

> "Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases when a citizen of the other state voluntarily becomes a party to the proceeding, has no jurisdiction of the case."

Accord,

McMillan vs. *McNeill*, 4 Wheaton, 209;
Suydam vs. *Broadnax*, 14 Peters, 67;
Cook vs. *Moffatt*, 5 Howard, 295;
Story, Conflict of Laws, 573;
2 *Kent. Comm.* (12 Ed.), 534.

It must be apparent that Section 63 (3) of the Insurance Law is a statute of discharge, even though in form it purports to regulate the inception of obligations and rights instead of to discharge them. For, under any definition of the surety's obligation on the bond, and regardless of whether that obligation be considered vested or contingent, it is nevertheless a contract duty to, at least, await the occurrence of the event which shall make its obligation fixed and perfect. Obviously, Section 63 (3) of the Insurance Law, if it arbitrarily prevents the operation of that event, that is the principal's default, discharges the existing contract duty of the surety.

Nor can it be said that the plaintiff-in-error has, within the meaning of the cases, "voluntarily become a party to the proceedings" under the statute, and thus subjected itself to the jurisdiction of the statute as it was intended to operate by the legislature. For the plaintiff-in-error did not present a claim, to be adjudicated on the merits and therein to be determined for the first time. On the contrary, it presented, and asked for the enforcement of, a liquidated debt called into confirmed existence by the judgment of a court of competent jurisdiction.

It is, further unsound to contend that the plaintiff-in-error has no contract rights in the bond entered into by the defendant with the United States. It has such rights, and is the beneficiary of the bond and entitled to sue under its terms, by virtue of 33 Statutes at Large, 778, which provides:

> "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall * * * have a right of action."

And see:

Lawrence vs. *Fox*, 20 N. Y., 268.

VI.

33 U. S. Statutes at Large 778, under which the right of plaintiff-in-error arises, is a Federal statute. It has been so interpreted by the Federal Courts as to sustain the contention of plaintiff-in-error and it was therefore error for the courts of New York State to refuse to follow this interpretation.

This point arises under Assignment of Error 4, page 137.

In *Southern Ry. Co.* vs. *Gray*, 241 U. S., 333, the court held at page 338:

> "As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal courts."

It has been shown by the judgment of the Federal Court for the Western District of North Carolina that the liability herein of the Casualty Company of America on its bond is not terminated by its insolvency occurring before the liability became fixed.

The following are illuminating as to the proper interpretation of the Federal Statute:

Report of Judiciary Committee to the House, April 11, 1904, Report 2360, 58th Congress:

> "The Committee on the Judiciary, to whom was referred House Bill 13, 626, respectfully submit the following report:
>
> The bill to amend the Act of August 13, 1894, for the protection of persons furnishing materials and labor for the construction of public works in such manner as to *secure to the United States priority in the satisfaction of its claim* against the contractor for such work out of the penalty of the bond given by him * * *.
>
> The necessity for this amendment has been brought about by the decisions of the Federal Courts that the law which gives the United States priority in the satisfaction of its claim against an insolvent (Revised Statutes, Section 3466) has no application to the case of an insufficiency of the penalty of the contractor's bond to satisfy both claim of the United States and the claims of the Subcontractors in the event of a default by the contractor." (Italics ours.)

Congressional Record, April 21, 1904:

> "Mr. Sherley: Allow me to ask whether the bill contained any provision looking to the protection of the subcontractor?
>
> Mr. Thomas of Iowa: Oh, yes. *It gives to the government a superiority of lien,* and then further provides that the government may bring suit on the bond to recover its claim, and in that suit the subcontractors may intervene.
>
> If the government should fail to bring suit, any contractor may bring suit; and in that suit all sub-contractors must be notified, and in the suit may have all their rights adjudicated." (Italics ours.)

23 Op. Att'y Gen., 174 (construing the Act of 1894, but equally applicable hereto):

> "The object of the Act was to afford a better method for enforcing against the contractor the

> claims of laborers and materialmen who had done work or furnished material upon property actually belonging to the United States, such as public buildings—which could only be erected upon land to which the United States had acquired a complete title * * *."

In view of these indications of legislative intent, the construction which should be placed on the provision forbidding the subcontractors to sue on the bond for six months after the completion of the work is, not that the right does not arise until then, but that it is merely suspended for that period in order to protect the Government's superior lien. *There should be recognition of the vital distinction between a condition of liability and a condition of the enforcement of that liability.*

See also *United States to the use of Hill* vs. *American Surety Co.*, 200 U. S., 197, 203.

It is apparent that it was error for the New York courts to take a contrary view in that it militates against the reasonable expectation of subcontractors operating in faith of the bond and it is also greatly inconvenient in a public sense, inasmuch as it will, if sustained, probably have the result of causing business men to refuse to sell supplies to contractors who construct for the Government. For these reasons, it is incumbent on the court to follow the spirit of *Knowlton* vs. *Moore*, 178 U. S., 41, in which the court said at page 77:

> "A particular construction of a statute which will occasion great inconvenience or produce inequality and injustice is to be avoided if another more reasonable interpretation is present within the Statute."

Again, it is clear that 33 U. S. Statutes at Large, 778, is highly remedial, its purpose being to assure protection to the sub-contractors who cannot take a lien on public buildings. For that reason, it should be liberally construed, according to the rule enunciated by Chief Jus-

tice Marshall in *Durousseau* vs. *United States*, 6 Cranch, 307, 313:

> "The spirit as well as the letter of a statute must be respected, and where the whole context of a law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent."

And as said of this Statute in *Illinois Surety Co.* vs. *John Davis Co.*, 244 U. S., 376, 380:

> "The purpose of the act was to provide security for the payment of all persons who provide labor or material on public work. This was done by giving a claim under the bond in lieu of the lien upon land and buildings customary where property is owned by private persons. Decisions of this court have made it clear that the Statute and bonds given under it must be construed liberally, in order to effectuate the purpose of Congress as declared in the act. In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the act. Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute."

It thus became the duty of the courts of New York to follow these cases.

> *Sloan* vs. *Martin*, 145 N. Y., 524;
> *Davenport* vs. *C. & O. Ry. Co.*, 149 N. Y. Supp., 865.

The court therefore erred in refusing to find the proposed conclusion of law numbered 7 (pp. 91-2).

VII.

The writ of error should be sustained. The orders of the New York Supreme Court dismissing and disallowing the claim of plaintiff in error should be reversed. The claim should be allowed as a priority claim in the sum of $105.50.

Dated, New York, April 9, 1925.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 301. 42

SOUTHERN ELECTRIC COMPANY,

Plaintiff-in-Error,

against

JAMES A. BEHA, Superintendent of Insurance of the State of New York as Liquidator of the CASUALTY COMPANY OF AMERICA (successor to and substituted herein for Francis R. Stoddard, Jr., successor of Jesse S. Phillips),

Defendant-in-Error.

ERROR TO THE NEW YORK SUPREME COURT.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR.

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JAMES A. BEHA,
ALFRED C. BENNETT,
Of Counsel.

POINTS.

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BRIEF ON BEHALF OF DEFENDANT-IN-ERROR.

Statement.

The preliminary statement of facts as set forth by plaintiff-in-error in its brief herein before this Court is substantially correct so far as it goes. The exceptions and additions thereto that are deemed material for this appeal are as follows:

The order of liquidation dated May 4th, 1917, entered in the New York Supreme Court, in addition to the direction to the Superintendent of Insurance for taking possession of the property and assets of the Casualty Company of America, contained the following restraining clause:

> "* * * ORDERED, that the officers, agents, employees, policyholders, stockholders and creditors of

> the said Casualty Company of America, and all other persons be enjoined and restrained from bringing or further prosecuting any action at law, suit in equity or special proceeding against said corporation, or estate, and from making or executing any levy upon the property or assets of said Casualty Company of America or from in any way interfering with the said Superintendent of Insurance or his successors in office in the control and management of the property of the said corporation, or in the discharge of his or their duties as liquidators thereof. * * *" (pp. 8-9).

Although plaintiff-in-error had due notice of the foregoing order and the injunction therein contained and had duly filed its proof of claim with the liquidator (pp. 9-12), nevertheless it commenced an action against the Casualty Company of America, over one year thereafter, in spite and in violation of the injunction contained in the foregoing restraining clause, and judgment was procured to be entered on August 24th, 1921, in the United States District Court for the Western District of North Carolina (Finding of Fact XI, p. 89; p. 99; pp. 109-110; Brief of Plaintiff-in-Error, p. 8). It does not appear that the New York State Superintendent of Insurance was joined as a party defendant in said suit and as a matter of fact and law he was not made a party to the suit, which should have been done if it was desired to give the judgment any binding effect against the liquidator. *Reynolds* v. *Stockton*, 140 U. S. 254; *Pendleton* v. *Russell*, 144 U. S. 640; *Rodgers* v. *Adriatic Ins. Co.*, 148 N. Y. 34. The introduction into evidence before the Referee of a certified copy of the judgment so procured was duly objected to by counsel for defendant-in-error on the ground that it was immaterial, irrelevant, incompetent; not binding on the liquidator; was entered after the order of liquidation and in a suit in which the liquidator was

not a party (p. 99, fols. 296, 297). Those objections and others were overruled by the learned Referee and an exception granted thereto (p. 105, fol. 315, pp. 108-109, fols. 324, 325).

On the evidence and the report of the Referee the claim was disallowed by an order of the Supreme Court dated the 29th day of May, 1923 (pp. 3-5, fols. 7-15). On an appeal to the Appellate Division the order of the Supreme Court of May 29th, 1923, was affirmed without opinion (p. 131).

Before the Appellate Division the plaintiff-in-error made a motion for leave to appeal to the Court of Appeals, which was denied (p. 103).

The plaintiff-in-error has failed to print as a part of its record the notice of motion and the affidavit and papers upon which the application to the Appellate Division for leave to appeal to the Court of Appeals was made, although those papers are referred to in the order printed in the record and are a part of the record (p. 130).

Annexed to this brief as Exhibit A is a copy of the papers on which the application to the Appellate Division for leave to appeal was made.

From those papers it will be observed that the plaintiff-in-error applied to the Appellate Division for leave to appeal under Subdivision 3 of Section 588 of the Civil Practice Act of New York as quoted at page 13 of the brief of the plaintiff-in-error before this Court, although it will be noted that in the moving papers it is claimed constitutional questions were raised and it should have appealed as a matter of right under subdivision 1. Undoubtedly, the Appellate Division, because of the constitutional questions raised, denied the application for the reason that if the constitutional questions raised were sound, the plaintiff-in-error should have appealed directly to the Court of Appeals under subdivision 1 of

Section 588 of the Civil Practice Act, as quoted at page 13 of the brief of the plaintiff-in-error before this Court.

The record fails to show that the plaintiff-in-error made an application to the Court of Appeals. It is admitted in the brief before this Court on behalf of the plaintiff-in-error that no such application was made to the Court of Appeals. See page 6 of the brief for plaintiff-in-error before this Court where the following appears:

> "Thereupon plaintiff-in-error moved for leave to appeal to the Court of Appeals and thereafter the Appellate Division denied said motion with costs (p. 130), 207 App. Div. (N. Y.), 893. The plaintiff-in-error having thus exhausted its remedies in the Courts of New York (p. 135) filed its petition for this writ of error (pp. 134-135, 136-137) to review the constitutional questions duly and seasonably raised in the course of the proceeding and decided adversely to it in the State Court (pp. 134, 112-114, 91-92, 79, 82-83)."

POINT I.

The plaintiff-in-error did not exhaust its remedies for review in the courts of New York, and the writ of error is not properly before this Court.

The writ of error should be dismissed.

That the plaintiff-in-error realizes it has not exhausted its remedies for review in the State courts of New York is shown by the elaborateness of its discussion under Point I of its brief and its failure therein to cite the cases and to discuss the statute, under which it might have appealed to the Court of Appeals.

If is contended by the plaintiff-in-error that the remedy of plaintiff-in-error in the State courts was exhausted when the *Appellate Division denied* it leave to appeal to the Court of Appeals.

The New York statute permitting appeals is printed in plaintiff's brief before this Court at pages 12 and 13.

It is noticeable that no application was made to the Court of Appeals, after the Appellate Division had denied leave, although that should have been done under plaintiff's theory of this case. Subdivision 4 of Section 588 of the New York Civil Practice Act as quoted at page 13 of plaintiff-in-error's brief before this Court as follows:

> "4. An appeal also may be taken from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding, but which is not appealable as of right under subdivision one of this section, where the appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, *or where, in case of the refusal so to certify, an appeal is allowed by the court of appeals.* Such an appeal shall be allowed when required in the interest of substantial justice. * * *" (Italics ours on this brief.)

As a condition precedent to the right to apply to the Court of Appeals, the plaintiff-in-error had to show that an application to the Appellate Division had been made and denied before an application could be successfully made to the Court of Appeals. Plaintiff did make the application to the Appellate Division and the application was denied, but no application was made to the Court of Appeals.

If the plaintiff-in-error had applied to the Court of

Appeals, that Court might have granted the leave and heard the appeal.

Plaintiff-in-error, by failing to apply to the Court of Appeals after the Appellate Division denied its application for leave, did not exhaust its remedy in the State courts.

This Court has uniformly dismissed writs in all cases in which applications have not been made to the highest courts, arising under analagous statutes providing for review by permission by the highest state courts.

> *Fisher* v. *Perkins*, 122 U. S. 522;
> *Stratton* v. *Stratton*, 239 U. S. 55;
> *Lancaster et al.* v. *Haughton*, 266 U. S. 590.

The rule laid down in those cases and which requires a dismissal of the writ at bar is clearly stated in the early and leading case of *Fisher* v. *Perkins, supra,* which was reiterated in *Stratton* v. *Stratton, supra,* followed and applied again in 1924 in *Lancaster et al.* v. *Haughton, supra.*

In *Stratton* v. *Stratton, supra,* a writ of error to the Ohio Court of Appeals of the Seventh Appellate District (being equivalent to the New York Appellate Division, the highest Court of Ohio being the Supreme Court) was dismissed. This Court said at page 56:

> "True, it is urged that under the Ohio law the jurisdiction of the Supreme Court was not imperative, but gracious or discretionary, that is, depending upon its judgment as to whether the case was one of public or great general interest—an exceptional class in which the case before us, it is insisted, we must now decide was not embraced. But this simply invites us to assume jurisdiction by exercising an authority which we have not, that is, by indulging in conjecture as to what would or would not have been the judgment of the Supreme Court of

Ohio if it had been called upon to exert the discretion vested in it by state laws. When the significance of the proposition upon which the claim of jurisdiction is based is thus fixed, it is not open to contention, as it has long since been adversely disposed of. Fisher *v.* Perkins, 122 U. S. 522; Mullen *v.* West. Un. Beef Co., 173 U. S. 116. Indeed, conforming to the rule thus thoroughly established, the practice for years has been in the various States where discretionary power to review exists in the highest court of the State, to invoke the exercise of such discretion in order that upon the refusal to do so there might be no question concerning the right to review in this court. See West. Un. Tel. Co. *v.* Crovo, 220 U. S. 364; Norfolk Turnpike Co. *v.* Virginia, 225 U. S. 264; St. Louis San Francisco Ry. *v.* Seale, 229 U. S. 156.

Dismissed for want of jurisdiction." (Italics are this court's.)

In *Fisher* v. *Perkins, supra,* the statutes of Kentucky were involved. Under those statutes and the Kentucky rules of practice an appeal did lie to the Court of Appeals if two of the judges of the Superior Court certified that in their opinion the question involved was novel and of sufficient importance. No application was made by appellant.

This Court in dismissing the writ said:

"This Court has no power to review any other judgments of the courts of a state than those of the highest court 'in which a decision in the suit could be had'. Sec. 709, Rev. Stat. The Court of Appeals is the highest court of the State of Kentucky, and, consequently, until it has been made to appear affirmatively on the face of the record that a decision in this suit could not have been had in that court, we are not authorized to review the judgment of the Superior Court."

In the case at bar the writ is directly to the Supreme Court, Appellate Division, which is the lower intermediate court. The Court of Appeals is the highest court of the State of New York. The record at bar fails to show that a decision of the Court of Appeals could not have been had in the case at bar. In fact, the record shows that a decision of the Court of Appeals might have been had if an application had been made and the appeal granted or denied by the Court of Appeals, according to plaintiff's own theory of the procedure required of it. On another theory of the case at bar the plaintiff might have appealed directly to the Court of Appeals as a matter of right if plaintiff's theory that a constitutional question is presented by the case at bar is correct. That phrase of the case at bar will be discussed in a moment in this brief. But, returning to the plaintiff's own theory of the procedure required of it and its failure to apply to the Court of Appeals after the Appellate Division had denied leave, we believe that the language of this court in the concluding sentences of the decision in *Fisher* v. *Perkins, supra*, completely concludes the case at bar. There this Court said at page 527:

> "As it is, *we find nothing in the record to show that the suit could not have been taken to the Court of Appeals if the necessary application had been made, and, consequently, we have no right to proceed.* * * * *The judgment is still the judgment of the Superior Court* (in the case at bar, the Appellate Division), which is not the highest court of the state, and it might have been taken to the Court of Appeals for review if the grant of an appeal had been applied for and secured. McComb-Commissioners of Knox County, 91 U. S. 1; Kimball *v.* Evans, 93 U. S. 320; Davis *v.* Crouch, 94 U. S. 514, 517. We are not to assume that an appeal would not have been granted if applied for. *The record must show its refusal.* (Italics our in this brief.)

"The motion to dismiss is granted." (Italics this court's.)

In *Mullen* v. *Western U. B. Co.*, 173 U. S. 116, this Court said, at page 123:

> *"We must decline to hold that it affirmatively appears from the record that a decision could not have been had in the highest court of the State, and, this being so, the writ of error cannot be sustained.* Fisher *v.* Perkins, 122 U. S. 522.
>
> *"Writ of error dismissed."* (Italics ours.)

The second ground on which the writ at bar should be dismissed is predicated on the theory of plaintiff-in-error to the effect that the failure to recognize the after-acquired judgment and to allow the claim did raise constitutional questions. If any of the constitutional questions that plaintiff-in-error claims are raised were in fact presented in the proceeding below, then the plaintiff-in-error had the right to appeal as a matter of right to the Court of Appeals of New York under subdivision 1 of Section 588 of the Civil Practice Act, as set forth on page 13 of the brief for plaintiff-in-error before this Honorable Court.

The third ground on which the writ at bar should be dismissed is predicated on the fact and law judicially established in the liquidation proceeding to review which the writ herein was issued, that the plaintiff-in-error could have appealed directly to the Court of Appeals. In Matter of Casualty Company of America (claim of Badgley), 234 N. Y. 503, the claim of the claimant, appellant was disallowed just as the claim of plaintiff-in-error here was disallowed, and the claimant appealed directly to the Court of Appeals from the Appellate Division, and the Court of Appeals heard the appeal and affirmed the order of the Appellate Division. Thus,

it has been judicially established by the highest court of the State in the very same proceeding in which the writ herein was granted that the plaintiff-in-error could have appealed directly to the Court of Appeals from the judgment it now seeks to review, but no such appeal was taken.

In the Badgley case, *supra*, the order of the Appellate Division was similar in all respects to the order in the case at bar. The Court of Appeals, by entertaining a direct appeal therefrom has decided the question whether the order was "final" and of such other character as to permit the Court of Appeals to review the order. The nature of the order and its appealability from the Appellate Division has therefore been determined by the highest court of the State of New York in this very proceeding, and we entertain no doubt but that this Honorable Court will follow such interpretation of our State practice and procedure.

Having failed to appeal to the Court of Appeals directly on either of the foregoing grounds and having failed to apply to the Court of Appeals for permission to appeal, although admittedly in a position so to do, the plaintiff-in-error has not exhausted its remedy in the State courts.

In fact, the record at bar presents an astoundingly strange avoidance by the plaintiff-in-error of the New York Court of Appeals. Plaintiff-in-error was within one step of the Court of Appeals, but it failed to take that step. Why, we do not know. The brief of plaintiff-in-error before this Court fails to reveal any reason for such a failure.

The writ in the case at bar should be dismissed.

POINT II.

The claim of plaintiff in error was contingent on the date of the entry of the order of liquidation, May 4th, 1917, and not fixed or vested and was properly disallowed by the court below.

The testimony taken before the Referee and the proof of claim filed by claimant with the Superintendent of Insurance clearly show that the work furnished by the Southern Electric Company was not completed until late in May or June, 1917, and the learned Referee so held (p. 79; fol. 235; pp. 81, 82; fols. 243-245). The items of this claim, as enumerated in the proof of claim (p. 11, fol. 32) are as follows:

"STATEMENT

To Southern Electric Company, Dr.,
16 Light Street,
Baltimore, Md. Feby. 28, 1919

John G. Unkefer & Co.,
Minerva,
Ohio.

Terms—30 days net.

May 17, 1917	$167.89
June 14, 1917	33.64
June 20, 1917	165.00
	$203.18"

Further on in the proof of claim (p. 12, fol. 35) it is stated that part of the merchandise was "shipped 6/8/17." The order of liquidation was entered in the Supreme Court of the State of New York, County of

New York, on May 4th, 1917 (pp. 6-9). It is evident, therefore, from the outset, from the mere statement of these facts alone that the order of liquidation antedated the date of the furnishing of materials by the plaintiff-in-error, and that no cause of action or vested right existed in plaintiff-in-error even as against the contractor, Unkefer & Co. on May 4th, 1917. *Plaintiff-in-error must go even further, however, in order to succeed as against the Casualty Company of America.* Its rights, if any, against this company arose from the bond (Claimant's Exh. 2, pp. 121-122, fols. 361-369), and said bond was furnished pursuant to 33 U. S. Statutes at Large 778 (Liquidator's Exh. A, pp. 125-127, fols. 373-381). It has been repeatedly held that under a bond given by a contractor for government work pursuant to the provisions of a federal statute, and particularly pursuant to the very statute in question in the case at Bar, the liability of sureties under such a special obligation is measured by the terms of the act which is an indispensable part of the contract or obligation of the surety.

Eberhart v. *United States,* 204 Fed. 884.

The bond and statute are to be read together. While the bond is intended for the benefit of both the United States and persons furnishing material, the remedy of the latter is in the statute and the way prescribed. Courts cannot change the statute or add to the liability of the surety who contracts with reference to this statute. The bond is given to the United States and not to the materialmen and is enforcible by materialmen in the cases specified and in the manner prescribed by Congress in the Statute.

United States v. *Winkler,* 162 Fed. 397.
Stitzer v. *United States,* 182 Fed. 513.

It has been held that when the purpose of Congress is stated in such plain terms that there is no uncertainty and where no construction is required, it is unnecessary to inquire into the motives which induced the legislation.

Lake County v. *Rollins*, 130 U. S. 662, 670.
United States v. *Lexington Mill & Elevator Company*, 232 U. S. 399, 409.
United States v. *McCord*, 233 U. S. 157, 163.

It was evidently the intent of Congress in the enactment of this statute in its final and present form first to protect the United States, to give the United States prior lien and first cause of action against any defaulting contractor or surety on the contractor's bond and then to protect sub-contractors or materialmen furnishing supplies on the job.

The language of the statute after specifying remedies of the United States sets forth as follows (fol. 376):

> "If no suit shall be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action and shall be and are hereby authorized to bring suit in the name of the United States in the circuit court of the United States in the district in which said contract was to be performed and executed irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his

sureties, and to prosecute the same to final judgment and execution: Provided That where suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later: And provided further, that where suit is so instituted by a creditor or by creditors only one action shall be brought and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract and not later. * * *"

This statute plainly and unequivocally by its terms gives materialmen no right of action against the surety until "six months from the completion and final settlement of said contract."

This Court has held that an action brought by a materialman before six months have expired from the time of completion and final settlement of the principle contracts, was premature and could not be sustained.

United States v. *McCord, supra.*
Stitzer v. *United States, supra.*

The words "final settlement" as used in this sense have been defined by the court to mean the time when the government is satisfied with the work and accepts it as it is, without making any claim against the contractor for unfinished or imperfect work, damages for delay or what not, and records that decision in some orderly way.

Illinois Surety Co. v. *Peeler*, 240 U. S. 214, 221.
United States v. *Robinson*, 214 Fed. 38.

In *United States* v. *Winkler, supra,* the court held that certain events must happen before a right of action arises on such bond against the surety in favor of a person supplying labor and materials to the contractor. First, the United States does not bring suit within six months; Second, there must be complete performance of said contract, and Third, there must be final settlement thereof. *In the case at bar concededly from the evidence, no one of these things had happened on May 4th,* 1917 *nor for a period of almost a year thereafter.* (See pp. 81, 82; fols. 243-245.)

The case of *People* v. *Empire State Surety Company,* 216 N. Y. 273 is on all fours with the case at bar. A New York surety company was declared insolvent by Supreme Court order on December 16th, 1912 pursuant to Section 63 of the Insurance Law. Claims of materialmen under bonds given pursuant to 33 U. S. Statutes at Large, 778, were rejected by the Superintendent of Insurance. No action had been brought by the United States government within the six months' period. The Court divided the claimants into two classes, one where *cause of action had accrued* and actions against the surety company commenced before December 16th, 1912, but no judgments as yet entered, and two, where *no causes of action had accrued* before December 16th, 1912, and no actions commenced thereon until after December 16th, 1912, and *the court unanimously held that the claims within the latter class were contingent and properly rejected.* As to the first class, the court held that the claims were certain and absolute and should be allowed. They stated that the date of completion and final settlement of the contracts was prior to the entry of the order of liquidation and that these claims (class #1) cannot properly be said to be contingent. The work under the contracts upon which they arose was completed and the cause of action accrued and commenced

soon after the expiration of the six months' period during which time the federal statute prohibited the commencement of such action. The Court in detail distinguishes rights of claimants under the rule established by *People* v. *Metropolitan Surety Company,* 211 N. Y. 107, stating that in that case "the claimants had no cause of action because the six months' period within which the statute gave the United States the right to sue had not expired and *until that time the creditors' right of action had not accrued.*" The liability of the surety was qualified and conditional upon the use of the statutory remedy. Divorced from that remedy, the right and the liability are non-existent.

In *People* v. *Empire State Surety Company, supra,* the very same question before this Honorable Court was certified to the New York Court of Appeals by the Appellate Division, viz.:

> "(3) Did the procurement of judgments against the Empire State Surety Company in the United States District Court in actions begun after the date of liquidation, to wit, December 16, 1912, entitle the claimants recovering such judgments to share in the assets of said surety company in the hands of the superintendent of insurance as liquidator?"

The Court answered this question in the negative.

It is well settled that in construing a State statute this Court will be bound by a decision of the highest Court of the State construing a prior statute on the same subject which would logically and necessarily require a similar construction.

Lisman v. *Knickerbocker Trust Company,* 211 Fed. 413.

Prentiss v. *Eisner,* 267 Fed. 16.

Hines, etc. Trustees v. *Martin,* 69 L. Ed. (U. S.) 604.

We submit that the decision of the New York court of Appeals in the Empire State Surety Company case, *supra*, is determinative of the sole question involved in this writ of error and that this Court should not hesitate to follow the opinion of the New York Court in its construction of the identical statute in question.

In *North Laramie Land Co.* v. *Albert E. Hoffman*, 69 L. Ed. (U. S.) 560, decided May 11th, 1925, this Honorable Court stated:

> * * * "But a state statute does not contravene the provisions of that Amendment unless, in some substantial way, it infringes the fundamental rights of citizens; and, in passing on the constitutionality of a state law, its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.
>
> All persons are charged with knowledge of the provisions of statutes, and must take note of the procedure adopted by them, and when that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it." * * *

The statute requires that all claims must be fixed as of the date of the order of liquidation. Section 63 of the Insurance Law concerning proceedings against and liquidation of delinquent insurance companies provides in Subdivision 3 thereof as follows:

> * * * The filing or recording of such order (order of liquidation) in any record office of the State shall impart the same notice that a deed, bill of sale or other evidence of title duly filed or recorded by such corporation would have imparted. The rights and liabilities of any such corporation and of its creditors, policyholders, stockholders and members and of all other persons interested in its

> assets, shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order directing the liquidation of such corporation in the office of the Clerk of the county wherein such corporation had its principal office for the transaction of business upon the date of the institution of proceedings under this section."

Plaintiff's rights, not being fixed at that date, cannot be cured or made more effective by any after-acquired judgment. The statute in plain and unequivocal terms requires all claims to be fixed as of a certain date and this is a rule of good, sound policy which protects all alike and offers no special immunities. Any other rule would alter and delay distribution of assets. Particular and individual claims should give way to the greater claims of the masses and to a wise public policy which demands an early distribution of the assets. (See *People* v. *Comm. Alliance Life Insurance Co.*, 154 N. Y. 95, 98.)

In *People* v. *American Loan & Trust Co.*, 172 N. Y. 371, cited by plaintiff-in-error at page 22 of its brief, the Court at page 378 held:

> * * * "The claims of creditors are presentable when the Receiver is appointed and that date fixes their status and amount regardless of when they are in fact presented. As we said in a recent case, 'it is the date on which the court practically takes possession of the assets of the company for the purpose of distribution among its creditors, and consequently (that) is the day on which the rights of creditors should be ascertained and the value of their claims determined.'" (Citing *People* v. *Commercial Alliance Life Insurance Co., supra;* Matter of *Equitable Reserve Fund Life Assoc. of the City of New York*, 131 N. Y. 354; *People Ex Rel. Atty. Gen-*

eral v. *Life and Reserve Assoc. of Buffalo*, 150 N. Y. 94.)

In Matter of Equitable Reserve Fund Life Assoc. of the City of New York, *supra*, at page 378 the Court held as follows:

> * * * "In Attorney General *v.* North American Life Insurance Co. (82 N. Y. 172, at 186) it was held that the date of the appointment of the Receiver under the act of 1869 was the proper one at which to value all claims against the company, although it was not in fact dissolved until another application at a later date and under a different act. The court said the company was practically, although not technically, dissolved upon the first appointment of the Receiver. * * * In this case the proceeding had for its end the dissolution of the company. We hold that after the commencement of the proceedings no assessments need be levied or paid; and if the proceedings terminate in dissolution, the status of the claimants at the commencement of the proceedings is the proper one upon which to base the distribution. * * *"

In *People* v. *Commercial Alliance Life Insurance Co.* (5. App. Div. (N. Y.) 273, cited by plaintiff-in-error at page 20 of its brief), a judgment in favor of the plaintiff was entered on December 5th, 1894, in a Michigan Circuit Court, wherein said suit had been pending for considerable time prior thereto. The order appointing the temporary Receiver in the main action for the dissolution of the corporation was entered on October 25th, 1894, practically a month prior thereto. This case comes within the scope of the classification defined by the court in *People* v. *Empire State and Surety Co.* 216, N. Y. 273. The cause of action had accrued and the action against the surety company had been commenced before the date

of the order of liquidation although no judgment had as yet been entered. Such a claim was admittedly a vested one and should have been allowed.

The claim of plaintiff-in-error was not vested therefore and there is no merit in its contention as set forth in the first paragraph of its Assignment of Errors "2." This was the only question before the court below and should be determinative of the action. This case does not present any federal question for the court's consideration. The issue was as to whether or not plaintiff's claim was vested at the time of the entry of the order of liquidation. In the consideration and determination of this question there cannot be any resort to any federal or constitutional questions; the question is merely one of interpretation of a State statute and of the power conferred by said statute upon the liquidator—nothing more.

POINT III.

The Insurance Law of the State of New York, and more particularly Section 63, Subdivision 3, is a valid and reasonable statute necessary for the protection of public interest and for all stockholders and creditors alike.

The constitution of the State of New York as adopted and promulgated on the 6th day of December, 1894, by Article 8, Section 1 thereof, provides as follows:

> "Section 1.—Corporations may be formed under general laws; but shall not be created by special act except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general

laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

The Legislature of the State of New York, pursuant to the authority granted by said section of the Constitution of the State of New York, duly enacted general laws regulating the organization and incorporation of insurance corporations in said State, and the Casualty Company of America was organized and existed pursuant to such general laws.

In the year 1909 the general laws were altered by the Legislature of the State of New York and such laws as so altered and in force and effect on May 4th, 1917, provided for proceedings against and liquidation of delinquent insurance corporations.

The law by its terms is made applicable to all persons, partnerships, corporations, associations and societies and to associations operating as Lloyds, inter-insurers or individual underwriters authorized by law to make insurances (Section 1) and was a regulatory law adopted to protect the public against conditions and practices over which they had no means of control.

This Honorable Court has held that the business of insurance is so far affected with the public interest as to justify legislative regulation; that a public interest can exist in a business such as insurance distinct from a public use of property and can be the basis of the power of the Legislature to regulate the personal contracts involved in such business; that the right to engage in the insurance business may be denied to individuals and permitted to corporations; that its dividends may be restricted; its interests controlled; form of its contracts prescribed; discrimination in its rates denied and the limitation of its risks imposed.

German Alliance Ins. Co. v. *Lewis*, 233 U. S. 389;

Mer. Mut. Lia. Ins. Co. v. *Smart*, 267 U. S. 127;
Phila. Fire Ass'n. v. *N. Y.*, 92 N. Y., 311; Aff'd 119 U. S., 110;
People v. *Formosa*, 131 N. Y. 478;
People v. *Reed*, 66 Misc. (N. Y.) 425;
Supreme Council of C. & F. v. *Fairman*, 62 How. Pr. (N. Y.) 386;
People v. *Loew*, 19 Misc. (N. Y.) 248;
Matter of Bean, 207 A. D. 276; Aff'd 238 N. Y., 552, 581, 618;
Matter of People (City Equitable Fire Ins. Co., 238 N. Y., 147);
Ex rel Hartford Ins. Co. v. *Fairman*, 12 Abb. N. C. (N. Y.) 252;
Paul v. *Virginia*, 75 U. S. (8 Wall) 168;
N. Y. Life Ins. Co. v. *Deer Lodge Co.*, 231 U. S., 495;
N. Y. Life Ins. Co. v. *Cravens*, 178 U. S., 389;
Hooper v. *California*, 155 U. S., 648;
Ward v. *Farwell*, 91 Ill., 593;
Burton v. *Aetna Life Ins. Co.*, 229 Ill. App., 517;
Allgeyer v. *Louisiana*, 165 U. S., 578.

The very basis of all state statutory legislation regulating the business of insurance and referring to insurance companies, whether domestic or foreign, rests entirely upon the fundamental proposition that the business of insurance is affected with a public interest, and, therefore, is a proper exercise of the police power of the State *for the protection of the wealth, health, comfort and prosperity of the people.*

Mer. Mut. Auto. Lia. Ins. Co. v. *Smart*, (*supra*);
German Alliance Ins. Co. v. *Hale*, 219 U. S., 307;
German Alliance Ins. Co. v. *Lewis*, (*supra*);
National Ins. Co. v. *Wanberg*, 260 U. S., 71.

In the last case the United States Supreme Court said:

> "The decision of this court in *German Alliance Ins. Co.* v. *Lewis*, 233 U. S., 389, settled the *right of a state legislature to regulate* the conduct by corporations, domestic and *foreign*, of insurance *as a business affected with a public interest.*"

In *German Alliance Ins. Co.* v. *Hale, supra,* the Supreme Court said at page 316:

> "*They* (regulations) *are enacted under the power with which the States have never parted, of caring for the common good within* the limits of constitutional authority. Insurance companies, indeed all corporations, associations and individuals, within the jurisdiction of a State are subject to such regulations, in respect to their relative rights and duties, as the State may, in the exercise of its police power and in harmony with its own and the Federal Constitution, prescribe for the public convenience and the general good. *Jacobson* v. *Massachusetts*, 197 U. S., 11, 27, 31; *Lake Shore, &c.* v. *Ohio*, 173 U. S., 285, 297; *House* v. *Mayes*, ante, p. 270. * * * *It was for the State, keeping within the limits of its constitutional powers, to say what particular means it would prescribe for the protection of the public in such matters.*"

The business of insurance is not of a federal nature. It is not interstate commerce and the Federal government cannot regulate it. The United States Supreme Court twice in the history of our country has expressly refused to hold that insurance is commerce and entitled to the rules of interstate commerce and therefore, not subject to state regulation. *Paul* v. *Virginia, supra; N. Y. Life Ins. Co.* v. *Deer Lodge County, supra.*

In the case last cited, the Supreme Court said at page 502:

> "* * * To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision."

Thus the power to deal with the business of insurance in all its phases, from the control of the inception and organization of the companies and individuals who conduct it to the supervision of liquidation proceedings in case the companies for any reason choose to or are compelled to discontinue business, concerning those corporations engaged in such a business in this State, is a sovereign power at all times reposed in the sovereign State of New York, exercised at the will of the sovereign State and in the manner willed by the State. *German Alliance Insurance Co.* v. *Hale, supra.* The depth to which the insurance business may penetrate the commercial life of our country and the extent to which regulation may follow is shown by cases recently decided by this Court. In *Merchants Mutual Auto Liability Insurance Co.* v. *Smart, supra,* decided March 2, 1925, a statute regulating the kind of policies to be written for the protection of pedestrians in the streets was sustained. The Court held that Section 109 of the New York Insurance Law in providing that no policy of insurance against loss or damage caused by the operation of an insured automobile should be issued unless it contained a provision that the insolvency or bankruptcy of the person insured should not release the insurer from paying the injured person and giving the injured person a right of action against the insurer in case an execution against the assured owner of the automobile was returned un-

satisfied because of the insolvency or bankruptcy of the assured owner, was not in conflict with the Federal Bankruptcy Law.

The Court said at page 129:

> "*It is well settled* that the business of insurance is of such a peculiar character, affects so many people and is so intimately connected with the *common good* that the State creating insurance corporations and giving them authority to engage in the business may, without transcending the limits of legislative power, regulate their affairs so far at least as to prevent them from committing wrongs and injustice in the exercise of their corporate functions. *Northwestern Life Insurance Company* v. *Riggs,* 203 U. S. 243, 254; *Whitfield* v. *Aetna Life Insurance Company,* 205 U. S. 489; *German Alliance Insurance Company* v. *Kansas,* 233 U. S. 389, 412, *et seq.; La Tourette* v. *McMaster,* 248 U. S. 465, 467; *National Insurance Company* v. *Wanberg,* 260 U. S. 71, 73."

* * * * * * *

At page 130 the Court further held as follows:

> "Whatever the especial occasion for the enactment, it is clear that the exercise of the police power in passing it was reasonable and cannot be said to deprive the insurance company of property without due process of law. It is to be remembered that the assumption of liability by the insurance company under Section 109 is entirely voluntary. It need not engage in such insurance if it chooses not to do so."

Subdivision 4 of the Bankruptcy Act of 1898 as amended to date expressly excepts from its operation and benefits Municipal, Railroad, Insurance or Banking corporation. It was therefore within the power of the States, and in this instance proper for the State of New York, to provide by statute for the regulation and conduct of insurance companies during their insolvency.

This court has held in two epoch making decisions which settle the law on the subject: (1) That when Congress has exercised its constitutional power to enact a uniform bankruptcy law all existing State insolvency laws applying to the same persons are suspended. *Sturges* v. *Crowninshield*, 4 Wheat. 122; but (2) That this power not being exclusive State laws are valid and continue operative so far as they do not conflict with the paramount Federal Law. See *Ogden* v. *Saunders*, 12 Wheat. 213. The prevailing rule seems to be that the operation of all laws enacted for the purpose of settling or winding up the estates and affairs of insolvent debtors, is suspended to the extent that the provisions thereof are conflicting. See In re *Wright*, 95 Fed. 807, 810.

In *Sturges* v. *Crowninshield, supra*, it was held that it must be true that whatever classes of actions are either expressly excepted from the operation of the bankruptcy act, or lie outside of the reach of its provisions, are left subject to State regulation. Such classes of cases and the conditions and situations which produce them are not within the field covered by the Federal Act and legislative provisions concerning them by the States cannot be said to be in conflict in any way with the Federal legislation. The power and jurisdiction of the States in the field of insolvency regulation is full and complete, except as federal legislation may invade and thereby limit it; and it is limited by such legislation only to the extent of that invasion. Wherever the field is not thus restricted, it must follow as a logical consequence that the power of the States remains. The field of restriction certainly cannot be broader than that of the operation of the federal statute. In other words, the test to be applied in determining whether or not the federal act suspends State laws is not one based upon a classification of persons, but upon a less arbitrary and more logical and just classification of cases, situations

and conditions insofar at least as they fall into clearly defined groups. Otherwise some portion of the proper field of bankruptcy and insolvency legislation is quite likely to remain unoccupied.

In *Murphy* v. *John Hoffman*, 211 U. S. 562, 569, the court held that where a court of competent jurisdiction has taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts, and that this rule applies generally to all courts, State and Federal. See also Matter of *Traunstein*, 225 Fed. 317; *Martin* v. *Oliver*, 260 Fed. 89; *Darrow* v. *First National Bank of Claremore*, 156 Pac. 191, 194; *Igel* v. *Phillips*, 183 A. D. (N. Y.) 220.

The court having possession of the property has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. A voluntary appearance of a party living without the district may constitute a waiver of the want of jurisdiction and confer jurisdiction over him.

Cole v. *Cunningham*, 133 U. S. 107, 115.
In Re Smith, 117 Fed. 961.
Gilman v. *Lockwood*, 4 Wall. 409.

It is the policy of law to bring all claimants against insolvent corporations into a common forum in the domiciliary state to avoid expenses.

Marshall v. *Wendell*, 45 A. D. (N. Y.) 120.
Rinn v. *Astor F. Ins. Co.*, 59 N. Y. 143.

In *Attorney General* v. *North American Life Insurance Company*, 6 Abb. N. C. (N. Y.) 293, the court held that when a proceeding is pending for the dissolution of a corporation the remedy of every creditor is in that proceeding only.

In construing Section 63 and the identical order by which the Superintendent of Insurance acquired title to the assets of the Casualty Company of America, and which order is now before this Court in the case at bar, the Appellate Division of the Supreme Court of New York in *Hartigan* v. *Casualty Company of America,* 180 A. D. (N. Y.) 194, said at page 196:

> "'* * * They (the Superintendents and his successors) are hereby vested with title to all of the property, contracts and rights of action of the said company, and directed to deal with the same in their own name as Superintendents of Insurance.' That provision was inserted in the order pursuant to Section 63 of the Insurance Law for the purpose of facilitating the duties of the Superintendent of Insurance in the process of liquidating the affairs of the insolvent corporation. The statute is one of enlargement rather than one of restriction. It was not designed to curtail or limit the powers or rights of the Superintendent in the duties imposed upon him in his official capacity."

In *Morse* v. *United States,* 267 U. S. 80, Mr. Justice Sutherland, writing the opinion of this Court, at page 82, said:

> "* * * The principle that when the jurisdiction of a court has attached, it must be respected as exclusive until exhausted, is a rule of comity, having a wide application in civil cases but a limited one in criminal cases. * * *"

The record clearly shows (p. 9, fols. 26-36) that the claimant, Southern Electric Company, the plaintiff-in-error herein, voluntarily appeared in the liquidation proceedings brought pursuant to the New York State Insurance Laws in which the State Superintendent of Insurance of New York had been appointed liquidator.

The plaintiff-in-error did not merely present a judgment of a sister State for enforcement in New York State; on the contrary, the affidavit of its Treasurer, Louis Lohrfink, sworn to March 20th, 1919 (p. 10, fol. 29), specifically sets forth *"that the said claim is not secured in whole or in part by any judgment* or by any mortgage or other lien upon real estate; *and is not secured in any way whatsoever;* and that no note or bond has been given therefor except as mentioned in the said claim." The proof of claim then follows (p. 11, fol. 31) and sets forth in detail each item shipped and the dates thereof. The testimony before the Referee on behalf of plaintiff-in-error (p. 96, fol. 286, etc.) shows an attempt on the part of claimant to support each item of work performed and to verify the performance of the labor itself. Further on during the course of the testimony (p. 99, fol. 297) plaintiff-in-error offered in evidence the judgment entered in the District Court for the Western District of North Carolina on August 24th, 1921, over two years after its proof of claim had been verified and filed in the liquidation proceeding in New York State. The introduction into evidence of this judgment was duly objected to on the ground that it was not binding on the liquidator, having been entered after the order of liquidation (p. 99, fol. 297).

POINT IV.

A person contracting with a foreign corporation is bound by the charter of said corporation and the statutes of its domicile regulating it.

The Casualty Company of America was a corporation existing by virtue of an edict of legislature of the State

of New York. It follows that it must die at the command of this legislature. Knowledge is imputed to all who deal with it that when it suspends business, the law under which it was created takes charge of its affairs, liquidates its debts, converts its assets and distributes the proceeds among its creditors with equality. Such a provision is contained in the Insurance Law of the State of New York. Those who contracted with the Casualty Company of America, or whose rights spring from contracts entered into with it, are presumed to know of the statutory conditions governing its existence and these conditions must be deemed to have permeated the agreement and to have constituted elements of the obligation.

Canada Southern R. Co. v. *Gebhard*, 109 U. S. 527, 537.

People v. *American Loan & Trust Company, supra.*

People v. *Globe Mutual Company*, 91 N. Y. 174, 179.

Relfe v. *Rundle*, 103 U. S. 222, 226.

Hale v. *Hardon*, 95 Fed. 747.

Warren Ross Lumber Co. v. *Haniel Clark & Son, Inc.*, 211 App. Div. (N. Y.) 591.

Bank v. *Granite State Prov. Ass'n*, 70 N. H. 557.

Murfree, "Foreign Corporations," Section 488.

Bockover v. *Life Ass'n of Amer.*, 77 Va. 85.

Carpinter & Baker v. *City Equitable Fire Insurance Co.*, 207 App. Div. (N. Y.) 249; affirmed in 238 N. Y. 147.

In the last case hereinabove cited, the Appellate Division held at page 251:

> "The City Equitable Fire Insurance Company, Limited, was organized under the Companies Act of the Kingdom of Great Britain and Ireland, which provides for the method of liquidation in case of in-

solvency and therefore its provisions are presumed to be a part of the charter of said company and hence have extra-territorial operation and effect." (Citing Sinnott *v.* Hannan, 214 N. Y. 454; Relfe *v.* Rundle, *supra*, and Parsons *v.* Charter Oak Life Insurance Co., 31 Fed. 305.)

In *Warren Ross Lumber Co.* v. *Haniel Clark & Son, Inc., supra*, the Court held as follows:

"* * * The rule is quite different where the statute of a foreign state provides how the assets of a corporation organized thereunder shall be conserved. Where insolvency proceedings are commenced against such a foreign corporation in the State of its domicile, a court of this State will give effect to the statute under which the corporation was organized as well as to the order appointing a Receiver. In such a case the title to the corporate property rests in the Receiver by virtue of the statute under which the corporation was organized. The corporation is a creature of the statute and carries with it into the various states in which it does business such provisions of the statute of its domicile and they are enforced under the principles of comity against its creditors in this state. 'Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence.' Thus where a foreign statute under which an insurance corporation was organized provided that in case of insolvency it was subject to dissolution and that title to its assets should vest in the State Insurance Commissioner, it was held that property of the corporation could not be attached by a resident creditor because the courts of this state under the principles of comity would recognize the title of the foreign assignee and enforce it wherever it could be done without injustice." (Citing Martyne *v.* American Union Fire Ins. Co., 216 N. Y. 183; Matter of City

E. F. Ins. Co., Ltd. (Carpenter & Baker), *supra;* Matter of Bean *v.* Stoddard, *supra;* Mitchell *v.* Banco de Londres y Mexico, 192 App. Div. 720.)

In the case of *Canada Southern R. Co.* v. *Gebhard, supra,* this court confirmed a reorganization scheme sanctioned by the courts of Canada by the terms of which a bonded security was substituted for the mortgage indebtedness of an embarrassed railroad corporation. Certain stockholders in New York State whose security was either impaired or destroyed by this substitution appealed to the District Court. The United States Supreme Court in the appeal, held that the Canadian arrangement is in entire harmony with the spirit of bankrupt law and not in conflict with the United States Constitution which prohibits States passing laws impairing the obligation of contracts; furthermore, that every member of a political community must necessarily part with some of the rights which as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic, and at page 538 of the decision, the Court held:

> * * * "It follows therefore that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."

Murfree, in his admirable text on foreign corporations, said (Section 488):

> "Where the sovereignty which creates a corporation, anticipates the contingency of its insolvency and dissolution and in granting its corporate franchise makes provision for such a result, providing a scheme of liquidation and directing how its assets shall be preserved and finally distributed among its

creditors, such enactments become a part of the corporate charter, which goes with the Company wherever its existence is recognized, and all persons dealing with it in whatsoever jurisdiction are charged with notice thereof and bound thereby. Thus, where the charter provided that in the event that the capital of a life insurance company becomes impaired, it shall be the duty of the Insurance Commissioner to proceed against the Company to annul its charter and wind up its affairs, and further provided a scheme of liquidation, which contemplated the audit and allowance of all demands against the corporation, including the reserve due on all outstanding policies, it was held that policyholders in another State must be presumed to know the terms of its charter, and of the laws regulating its existence, and that after such proceedings have been instituted against it, in the State of its creation, they cannot maintain suits against it for the reserve value of their policies, by attachment of the property of the company within the other State, *but must be remitted to their remedy under the scheme of liquidation so provided.*"

In *Bank* v. *Granite St. Ass'n, supra,* the Court at page 560 said:

> "Creditors and shareholders of the corporation when they become such, wherever the transaction took place, impliedly agreed that in case of insolvency the final settlement of the corporation's affairs should be made in this State and be governed by the laws of the State."

In *Cook* v. *Moffatt,* 5 Howard 295, at page 315, Justice Woodbury in discussing State insolvency laws and their effect held that the State possesses the constitutional right to pass insolvent or bankrupt laws discharging contracts subsequently made provided no concurrent

legislation by Congress exists at the same time on the subject, and such laws cannot be considered as impairing the obligation of contracts, which are made under and subject to them; that such laws are to be regarded as being a part of a subsequent contract, incorporated in it; and hence that the contract being construed according to the *lex loci contractus* should be discharged by certificate of bankruptcy given to the obligor in the State where the contract was made and was to be performed; and this whether the action on it is brought in that State or another, or in the courts of the United States, and whether the obligee reside in that State or elsewhere, the law being considered as a part of the contract, it is inseparable from it and follows it into all hands and places.

POINT V.

There was no denial of the due faith and credit clause of the United States Constitution by the New York Courts in this case, nor was any other constitutional right of the plaintiff in error denied or infringed upon by the disallowance of its claim.

Plaintiff-in-error in Point II of its brief herein attacks the judgment of the New York courts on appeal herein as a denial of the full faith and credit clause of the United States Constitution. The contention is that the judgment in favor of the plaintiff-in-error in he United States District Court for the Western District of North Carolina, commenced long after the appointment of the liquidator in New York State, with judgment entered in August, 1921, over four years after said liquidator's appointment,—that this judgment is valid

and operative and should have been recognized by the Referee as conclusive and determinative of plaintiff-in-error's claim.

This Court has held that a judgment procured against a corporation in a state foreign to its domiciliary state, after the dissolution of the corporation in the domiciliary state, cannot be enforced in a proceeding to liquidate the affairs of the corporation in the domiciliary state.

Pendleton v. *Russell* (*supra*);
Reynolds v. *Stockton* (*supra*);
Rodgers v. *Adriatic Ins. Co.* (*supra*).

Where a statutory system for liquidating insurance companies is being administered in which the liquidation is conducted by a state official and all actions restrained by an injunction of the court, such a proceeding is equivalent to the older proceedings in which receivers were appointed and dissolutions were had. So it has been held in the liquidation proceeding of the Casualty Company of America by the Superior Court of Washington in the case of *Best* v. *Casualty Company of America, et al.* (unreported), where it was said that there is no special "magic" in "dissolution."

The exhaustive opinion of Judge Jury is annexed to this brief and marked Exhibit B, because it contains a clear and sound exposition of the effect of the New York Law under which the Casualty Company of America is being liquidated and shows how other states have recognized the Liquidation Law of New York, and particularly in the very proceeding now at bar. In that connection see *Kinsler* v. *Casualty Company of America*, 103 Neb. 382; see also *Cogliano* v. *Ferguson*, 245 Mass. 364.

A judgment of one State is not always *res adjudicata* or conclusive in an action brought thereon in another State between the same parties. It has been repeatedly

held that it is no denial of the full faith and credit clause of the Constitution to inquire as to the jurisdiction of the court over the person and subject matter, as to whether the judgment was responsive to the issues tendered by the pleadings, or as to whether defendant had notice.

Reynolds v. *Stockton, supra;*
Thorman v. *Frame,* 176 U. S. 350;
Thompson v. *Whitman,* 85 U. S. 457 (18 Wall. 457);
Cole v. *Cunningham, supra;*
Cooper v. *Newell,* 173 U. S. 555, 566;
Swift v. *Meyers,* 37 Fed. 37, 43.

By filing its proof of claim with the Superintendent of Insurance in the State of New York (pp. 9-12, fols. 26-37) the claimant plainly submitted itself to the jurisdiction of our courts and the procedure regulated by the provisions of the Insurance Law concerning liquidation of insurance corporations. It has been held that a claimant filing its proof of claim with the Superintendent of Insurance as Receiver for materials furnished to a contractor, under conditions almost identical to the facts in the case at Bar, and who thereafter filed a petition in a certain proceeding in the United States District Court of another State praying for payment of its claims out of deposited funds in that State, was guilty of a contempt of court and was properly punished for contempt.

In re Emmett, 164 App. Div. (N. Y.) 586.

Plaintiff-in-error had notice of the appointment of the State Superintendent of Insurance as liquidator. Its claim was clearly contingent on the date of the said appointment, May 4th, 1917, which was the date for the

fixing of all claims (pp. 32, 33; fols. 96-98). The Superintendent of Insurance in his report disallowing the claim of claimant (page 38, fol. 114 thereof) stated as follows:

"CONTINGENT CLAIMS.

> The contingent claims, that is, those claims which accrued subsequently to the entry of the order of liquidation, are not entitled to share until all debts which had accrued when the order of liquidation was entered are paid in full. These claims have not been fixed or determined as hereinbefore stated. The labor and expense of determining these claims will not be incurred until it appears as a matter of fact that all debts existing on May 4th, 1917, are or can be paid in full." * * *

It is difficult to perceive how plaintiff-in-error by reducing its contingent claim in the insolvency proceeding to a judgment long after May 4th, 1917, could acquire more rights or make valid said claim which was clearly invalid as a contingent claim on the date when all claims must be determined. Pursuing an alleged cause of action to judgment in a federal court of another State should give plaintiff-in-error no greater rights than the citizens of New York State had. The doctrine cannot be correct that New York law means one thing when applied to her own citizens and another thing when applied to other persons. The Constitution of the United States is obligatory within a State itself as well as between citizens of different States. The protection which it extends over all extends to persons in the same State and if such protection prevents the claims of a foreign creditor from being destroyed by an insolvency law, it must equally secure the claims of a domestic creditor. Any other result would be that such laws must be entirely swept away even as regards the internal concerns of a

State in which her own citizens alone have an interest. This conclusion is not likely to be adopted or encouraged by this Court.

All that is required of courts of this State in giving effect to Federal court judgments is that said judgments be given the same effect that is given State court judgments of the same character and rendered under similar circumstances by the courts of the State in which they are rendered. Section 905 Revised Statutes U. S. as construed by this court in numerous cases so requires.

See also

Dupasseur v. *Rochereau*, 21 Wall. 130, 135.
Mills v. *Duryee*, 7 Cranch. 481, 484.
Hampton v. *McConnell*, 3 Wheat. 234.
Metcalf v. *Watertown*, 153 U. S. 671, 676 and cases cited.
McElmoyle v. *Cohen*, 13 Pet. 312, 326.
Thompson v. *Whitman*, *supra*.
Abraham v. *Casey*, 179 U. S. 210, 218.

It is the contention of defendant-in-error that the decree or judgment of the Western District Court of North Carolina is null and void for the reason that rights of plaintiff-in-error must be determined in the insolvency proceeding in New York State; that therefore the North Carolina District Court had no jurisdiction of the suit and no legal power or authority to render said decree or judgment. Want of jurisdiction over either the person or the subject matter may always be shown.

Andrews v. *Andrews*, 188 U. S. 14.
Clarke v. *Clarke*, 178 U. S. 186, 195.

It is the duty of the State courts as well as of the Federal courts to see to it that no Act of a State Leg-

islature impairing the obligation of contract is sustained *and it is the duty of the Federal courts as well as of the State courts to see to it that no Act of a State Legislature is avoided on the pretext of impairment of obligations of a contract when in fact there is no contract to impair.* This is a rule of general law as to the conclusiveness of a judgment and not a construction of the Federal Constitution. (See dissenting opinion of Chief Justice Fuller at page 523 in *Deposit Bank* v. *Frankfort,* 191 U. S. 499, in which dissent Judges Brewer, Brown and Peckham concurred. That case is cited by plaintiff-in-error at page 17 of its brief herein.)

In *Fauntleroy* v. *Lum,* 210 U. S. 230, cited by plaintiff-in-error at page 18 of its brief the facts were briefly as follows: A dispute over a gambling debt, illegal in the State of Missouri, was left to arbitration in said State by the parties and an award made. Enforcement of the award could not be had by recourse to the courts of Missouri and the plaintiff brought suit in Mississippi and recovered a judgment. Thereafter he sued in Missouri on this judgment and the court held that the due faith and credit clause of the Federal Constitution compelled recognition of this judgment. Judges White, Harlan, McKenna and Day dissented and at page 239 of the report the able dissenting opinion of Judge White appears in part as follows:

> * * * "Although not wishing in the slightest degree to weaken the operation of the due faith and credit clause as interpreted and applied from the beginning, it seems to me that this ruling so enlarges that clause as to cause it to obliterate all State lines, since the effect will be to endow each State with authority to overthrow the public policy and criminal statutes of the others, thereby depriving all of their lawful authority." * * *

The court continued to state that this was contrary to the conceptions which caused the due faith and credit clause to be placed in the Constitution and that the decision in this case did not do comity.

In *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265 it was decided that the court had power to ascertain whether the cause of action was such as to give the Wisconsin court jurisdiction to render a judgment entitled to enforcement in other States. At page 292 of this decision the court held:

> * * * "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." (Citing cases in support.)

The court emphasized in its decision the ancient maxim that something could not be made out of nothing; that which is void for reasons of public policy cannot be made valid by confirmation or acquiescence.

The case of *Hampton v. McConnell, supra,* cited by plaintiff-in-error at page 18 of its brief, is not in conflict with the contention of defendant-in-error. The Hampton case determined the degree of effect which was to be given to a judgment which was entitled to be enforced, and therefore did not possibly concern the question in the case at Bar.

In *Wm. Filene's Sons Co.* v. *Weed,* 245 U. S. 597, cited by plaintiff-in-error at page 24 of its brief, the court, at page 601, expressly held as follows:

> * * * "When a statutory system is administered the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made." * * *

This case differs upon its facts from the case at Bar. A receiver was appointed by the court upon the prayer of a creditor, assented to by the corporation, in a bill brought for continuing the business until the assets could be applied to the satisfaction of the company's debts. The court in its opinion, quoted aforesaid, clearly pointed out *where a statutory system* is administered the courts must follow the dictates of the statute. In the Filene case the court without statute took possession of the assets.

The other federal questions alleged to have been violated by the New York courts in the case at Bar and which the plaintiff-in-error seeks to review on this appeal are so lacking in substance as to be frivolous. In Point III of its brief at page 25 appellant alleges that

Section 63 (3) of the New York State Insurance Law is unconstitutional if held to defeat the claim of plaintiff-in-error because an unreasonable classification of the rights of a corporate surety as against a natural surety is created thereby. Plaintiff-in-error cites cases holding that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances.

The objection that a State statute denies to a party equal protection of the law can only be sustained if the statute treat the party differently than it does others who are in the same situation as he; that is others in the same relation to the purpose of the statute.

Lloyd v. *Dollison*, 194 U. S. 445, 447.
International Harvester Co. v. *Missouri*, 234 U. S. 199.
Atchison etc. R. Co. v. *Matthews*, 174 U. S. 96, 103.
Gulf etc. R. Co. v. *Ellis*, 165 U. S. 150.
Halter v. *Nebraska*, 205 U. S. 34.
Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78.

The first paragraph of Section 63, Subdivision 3 of the statute in question specifically sets forth that the regulations contained therein shall apply to all corporations, associations, societies and orders to which any Article of this Chapter is applicable.

The rule is well established that the Legislature of a State is not debarred from classifying according to general considerations and with regard to prevailing conditions, otherwise there could be no legislative power to classify. It is always possible by analysis to discover

inequalities as to some persons or things embraced within any special class.

Miller v. *Wilson,* 236 U. S. 373.

The question is whether the restrictions of the statute have reasonable relation to a proper purpose.

Chicago B. & Q. R. R. v. *McGuire,* 219 U. S. 549, 567.
Erie R. R. v. *Wisconsin,* 23 N. Y. 685, 699.

In *Miller* v. *Wilson, supra,* at page 383 of the decision the court held that the rule was well established that the Legislature is not bound in order to support the constitutional validity of its regulations to extend it to all cases which it might possibly reach; dealing with practical exigencies the Legislature may be guided by experience, the court citing *Patsone* v. *Pennsylvania,* 233 U. S. 138, 144. Continuing, the court held that if an evil is especially experienced in a particular branch of business, it is not necessary that the prohibition should be couched in all-embracing terms and if it hit the evil where it is most felt, it is not to be overthrown because there are other circumstances to which it might have been applied.

Section 54 of the Insurance Law is as follows:

> "Conduct of insurance business by persons not incorporated. No persons, partnerships, or association of persons shall engage in the business of insurance in this state except as agent of a person or corporation authorized to do the business of insurance in the state, unless possessed of the capital required of an insurance corporation doing the same kind of business in the state and invested in the same manner; nor unless he or they shall have made and deposited with the superintendent of insurance se-

curities of the same amount required of an insurance corporation doing business in this state, nor unless the superintendent of insurance shall have granted to him or them a certificate to the effect that he or they have complied with all the provisions of law which an insurance corporation doing business in this state is required to observe, and that the business of insurance specified therein may be safely intrusted to the person, partnerships or association or persons to whom the certificate is granted.

"Every person, partnership or association receiving any such certificate of authority shall be subject to the insurance laws of the state and to the jurisdiction and supervision of the superintendent of insurance in the same manner as if an insurance corporation authorized by the laws of the state to engage in the business of insurance specified in the certificate.

"No such person, partnership or association shall transact business under a corporate or fictitious name or under any name, style or title other than the true name of such person, or of the persons comprising such partnership or association." (Italics ours.)

It cannot seriously be contended on the part of plaintiff-in-error that a State may not designate what persons may carry on the business of insurance within the State and how such business shall be regulated, it being well established that insurance affects a public interest and therefore is subject to statutory regulation.

German Alliance Ins. Co. v. *Lewis, supra.*

The first right of a State is self-protection and this includes the universally acknowledged power and duty to enact and enforce all such laws not in plain conflict with some provision of the State or Federal Constitution,

provided such laws may rightly be necessary or expedient for the safety, health morals, comfort and welfare of its people. The laws should be general and not special and should tend toward equality and be calculated to promote peace and good-will. The Supreme Court of the United States should follow the construction of a State statute given by the courts of that State and should test the constitutionality of that statute under that view.

Knoxville Iron Co. v. *Harbison,* 183 U. S. 13, 21.
Gatewood v. *North Carolina,* 203 U. S. 531, 541.
Atchison etc. R. Co. v. *Matthews, supra.*

Plaintiff-in-error in its Point IV attacks the constitutionality of Section 63 (3) in that it destroys the rights of plaintiff-in-error under the bond between the Casualty Company of America and the United States and under the contract between the United States and the Casualty Company of America (p. 27, Brief of Plaintiff-in-Error). The contention is made that the statute thus interpreted impairs the obligation of contract, deprives plaintiff-in-error of a vested right and thus takes property without due process of law and contrary to the protection of the Fourteenth Amendment. Appellant contends that its rights arose under the contract uncontrolled by Section 63 (3) of the New York State Insurance Law which it seeks to term "a condition subsequent not expressed in the contract and not contemplated by the parties, the expressed intent of the parties to a contract made in another jurisdiction." (Brief of Plaintiff-in-Error, p. 28.)

The rights, if any, of plaintiff-in-error arose out of the contract between the contractor and the United States and the bond deposited by the Casualty Company of America. This contract and this bond, created in the year 1915, came into existence many years after the passage of the Insurance Law of the State of New York

which became a law February 17th, 1909, constituting Chapter 28 of the Consolidated Laws of the State of New York. Plaintiff's rights therefore are subject to the provisions of this statute. This principle has been fully discussed and supported by citation of authorities by defendant-in-error in Points II, III and IV of this brief. An individual dealing with a foreign corporation, or claiming rights arising out of a contract with a foreign corporation, is deemed to be cognizant of the laws controlling said corporation both as to its existence and as to its discharge. Contracts made after the enactment of a statute are made subject to it and impose only such obligations and create only such property as the law permits.

Abilene National Bank v. *Dolley*, 228 U. S. 1.
Chicago etc. R. Co. v. *Cram*, 228 U. S. 70.

It has even been held by this Court that a State law divesting vested rights violates no constitutional provision where it does not impair the obligation of contract; it is only when legislation acts upon contracts as distinct from vested rights that the prohibition against impairing the obligation of contracts is infringed.

Blaut v. *Windley*, 95 U. S. 173, 180.
Long Island etc. Co. v. *Brooklyn*, 166 U. S. 685.
Adirondack R. Co. v. *New York*, 176 U. S. 335, 350.

A test is laid down in the case of *Detroit United Ry.* v. *Michigan*, 242 U. S. 238, the Court at page 249 holding that the following elements must be present before the constitutional right of impairment of contract by legislation or other act has been infringed:

(1) There must be a contract;

(2) There must be obligation arising therefrom;
(3) These obligations must have been impaired by subsequent legislation.

The prohibition of the Constitution against the impairment of contract rights applies only to laws which are retrospective in their operation; contracts are not impaired by laws passed prior to their execution and States are free to legislate as to future contracts.

Railroad v. *McClure*, 10 Wall. (U. S.) 511.
Lehigh Water Co. v. *Easton*, 121 U. S. 388, 391.
Pinney v. *Nelson*, 183 U. S. 144, 147.

Defendant-in-error has heretofore in this brief discussed the principles with reference to the extra-territorial operation of Section 63 (3) of the Insurance Law, and the interpretation by State courts of Federal statutes, Points V and VI of Brief for Plaintiff-in-Error herein.

POINT VI.

The writ of error should be dismissed and the orders of the New York Supreme Court dismissing and disallowing the claim of plaintiff in error should be affirmed with costs.

All of which is respectfully submitted,

CLARENCE C. FOWLER,
Attorney for Defendant-in-Error.

JAMES A. BEHA,
ALFRED C. BENNETT,
Of Counsel.

Exhibit A.

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

IN THE MATTER
of the
Application of the People of the State of New York, by JESSE S. PHILLIPS, Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

IN THE MATTER
of the
Claim of the SOUTHERN ELECTRIC COMPANY,
Claimant-Appellant.

Sir:

Please Take Notice that upon the annexed affidavit of Arthur F. Gotthold, verified the 21st day of November, 1923, upon the papers on appeal and the briefs previously filed herein, upon the order of this Court, made and entered on November 9, 1923, and upon all the proceedings heretofore had herein, a motion will be made by the undersigned at a term of the Appellate Division of the Supreme Court for the First Department, held at the Court House at Madison Avenue and Twenty-fifth Street, Borough of Manhattan, City of New York, on the 30th day of November, 1923, at ten o'clock in the

forenoon or as soon thereafter as counsel can be heard, for an order allowing the appellant to appeal to the Court of Appeals from the said order of this Court, dated November 9, 1923, affirming the order of the Supreme Court entered in the office of the Clerk of the County of New York on May 29, 1923, whereby it was ordered that the motion of the Superintendent of Insurance, as Liquidator of the Casualty Company of America, to dismiss and disallow the claim of the Southern Electric Company upon the report of the Referee therein be granted, and whereby it was further ordered that the claim of the Southern Electric Company be dismissed and disallowed, and for such other and further relief as may be just and proper, and that thereupon this Court certify to the Court of Appeals the following questions of law for review by the Court of Appeals:

1. Did the procurement of a judgment by the claimant against the Casualty Company of America in the United States District Court for the Western District of North Carolina on a claim for materials supplied to the principal before the date of the entry of the order of liquidation of the Casualty Company of America, to wit, May 4, 1917, in an action begun after the date of said liquidation order, entitle the claimant recovering said judgment to share in the assets of said surety company in the hands of the Superintendent of Insurance, as Liquidator?

2. Does the judgment of the United States District Court for the Western District of North Carolina, duly obtained by the claimant against the Casualty Company of America in an action begun after the date of the order of liquidation of the said surety, preclude the Superintendent of Insurance, as Liquidator of the said surety, from objecting to the claim of the claimant for

the reason that such judgment under the Constitution of the United States must be given full faith and credit by the Courts of this State?

3. Is the disallowance and dismissal of the claim of the claimant, under § 63 (3) of the Insurance Law of the State of New York, unconstitutional by reason of the fact that it causes an unreasonable classification of the rights of the corporate surety as against the natural surety, and as such is class legislation and violates the Fourteenth Amendment of the Constitution of the United States?

4. Is the disallowance and dismissal of the claim of the claimant, under § 63 (3) of the Insurance Law of the State of New York unconstitutional by reason of the fact that it impairs the obligation of the contract between the United States and the Casualty Company of America and as such violates the provisions of Article I, Section 10, Clause 1, of the Constitution of the United States?

5. Is the disallowance and dismissal of the claim of the claimant, under § 63 (3) of the Insurance Law of the State of New York unconstitutional by reason of the fact that it deprives the claimant herein of its vested right under the bond between the United States and the Casualty Company of America and takes property without due process of law and as such violates the provisions of the Fourteenth Amendment of the Constitution of the United States?

6. Are the Courts of New York obligated to follow the decisions of the Federal Courts in interpreting 33 U. S. Statutes at Large, 778, and to hold that the right of a materialman against a surety on a bond of a con-

tractor to the United States Government under the provisions of this Statute accrues immediately and that the right of action is merely suspended until six months after the completion and final settlement of the contract?

7. If the claim of the claimant is allowed, is it entitled to priority of payment under the provisions of 33 U. S. Statutes at Large, 778?

Dated, New York, November 21, 1923.

Yours, etc.,
ARTHUR F. GOTTHOLD,
Attorney for Appellant,
Office and P. O. Address,
27 William Street,
Borough of Manhattan,
New York City.

To:
CLARENCE C. FOWLER, ESQ.,
Attorney for Respondent,
110 William Street,
New York City.

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

IN THE MATTER
of the
Application of the People of the State of New York, by JESSE S. PHILLIPS, Superintendent of Insurance, for an order to take possession of the property and liquidate the business of the CASUALTY COMPANY OF AMERICA.

IN THE MATTER
of the
Claim of the SOUTHERN ELECTRIC COMPANY,
Claimant-Appellant.

STATE OF NEW YORK,
County of New York, } ss.:

ARTHUR F. GOTTHOLD, being duly sworn, deposes and says:

I am the attorney for the appellant, Southern Electric Company, herein.

This is a motion by the appellant under subdivision 3 of § 588 of the Civil Practice Act for an order of this Court allowing an appeal to the Court of Appeals from the determination of this Court herein, made and entered on November 9, 1923, affirming the order of the Supreme Court, entered in the office of the Clerk of the County of

New York on May 29, 1923, whereby it was ordered that the motion of the Superintendent of Insurance, as Liquidator of the Casualty Company of America, to dismiss and disallow the claim of the Southern Electric Company, upon the report of the Referee herein, be granted, and whereby it was further ordered that the claim of the Southern Electric Company be dismissed and disallowed. As part of this motion the appellant requests this Court to certify that the questions of law set forth below have arisen herein and that, in the opinion of this Court, these questions should be reviewed by the Court of Appeals.

The previous proceedings and the facts of this case have been fully set forth at pages 2 and 3 of appellant's original brief, duly filed with this Court upon the appeal herein, and it seems unnecessary to repeat them at length upon this motion. Reference is respectfully made to such brief as a part of this affidavit.

No opinion was handed down by this Court with its said order of November 9, 1923, from which order appellant asks leave to appeal to the Court of Appeals. However, the brief of the respondent took the position that the claim of the appellant against the Casualty Company of America should be dismissed and disallowed because no cause of action had accrued to the claimant before the date of the order of liquidation of the Casualty Company of America, and that therefore the said claim of the appellant was contingent and not allowable under the authority of the following cases:

People v. *Metr. Surety Co.*, 205 N. Y. 135;
People v. *Metr. Surety Co.*, 211 N. Y. 107;
Matter of Empire State Surety Co., 214 N. Y. 553;
Matter of Empire State Surety Co., 216 N. Y. 276.

It would appear that this Court agreed to these contentions of the respondent.

Appellant in its original brief to this Court pointed out (pages 11-14) that the specific situation existing in the case at bar, to wit, one where the materials were supplied by the claimant to the principal before the date of the order of liquidation but upon which liquidated claim no action against the surety had been commenced until after the order, had never been passed upon by our Court of Appeals. *Matter of Empire State Surety Co.*, 216 N. Y. 273, discusses:

1. Claims upon which causes of action had accrued and upon which actions against the surety had been commenced before the date of the entry of the order of liquidation, in which actions judgments on that date had not been entered.

2. Claims upon which no causes of action against the surety had accrued before the date of the entry of the order of liquidation and upon which claims no actions were commenced until after the date of the order of liquidation.

The situation in the case at bar differs from both of the above, as herein there is a claim upon which the cause of action against the surety had accrued in the sense that the claimant had made deliveries of materials before the date of the entry of the order of liquidation but upon which claim no action had been commenced until after this date. Appellant believes that because of the fine distinctions made by the Court of Appeals in their decisions as above cited, and also because the cases of *People* v. *Metr. Surety Co.*, 211 N. Y. 107, and *Matter of Empire State Surety Co.*, 216 N. Y. 276, the two lead-

ing cases on the subject, were four to three decisions, the determination of the Court of Appeals should be obtained on the new angle of the liquidation of an insurance company presented by the case at bar.

Appellant further desires to point out that in its original brief to this Court and in all the proceedings herein, it has set forth and presented certain constitutional objections to the dismissal and disallowance of its claim against the Casualty Company of America. An examination of the various cases previously decided by the Courts of this State shows that these constitutional questions have never been considered. Appellant has raised these constitutional questions in good faith. Under the decisions of the Court of Appeals the order made herein by this Court may not be of the character that permits appellant to appeal as of right to the Court of Appeals. Appellant believes that its propositions, raised to the best of deponent's knowledge and belief for the first time in these cases, questioning on constitutional grounds the interpretation of § 63 (3) of the Insurance Law of the State of New York previously made by our Courts and the recognition of a judgment duly obtained by it in another jurisdiction, should be passed upon by our Court of Appeals.

For the reasons set forth above, appellant respectfully requests that an appeal to the Court of Appeals be allowed herein and that the following questions be certified for the determination of the Court of Appeals:

1. Did the procurement of a judgment by the claimant against the Casualty Company of America in the United States District Court for the Western District of North Carolina on a claim for materials supplied to the principal before the date of the entry of the order of liquidation of the Casualty Company of America, to

wit, May 4, 1917, in an action begun after the date of said liquidation order, entitle the claimant recovering said judgment to share in the assets of said surety company in the hands of the Superintendent of Insurance, as Liquidator?

2. Does the judgment of the United States District Court for the Western District of North Carolina, duly obtained by the claimant against the Casualty Company of America in an action begun after the date of the order of liquidation of the said surety, preclude the Superintendent of Insurance, as Liquidator of the said surety, from objecting to the claim of the claimant for the reason that such judgment under the Constitution of the United States must be given full faith and credit by the Courts of this State?

3. Is the disallowance and dismissal of the claim of the claimant, under § 63 (3) of the Insurance Law of the State of New York, unconstitutional by reason of the fact that it causes an unreasonable classification of the rights of the corporate surety as against the natural surety, and as such is class legislation and violates the Fourteenth Amendment of the Constitution of the United States.

4. Is the disallowance and dismissal of the claim of the claimant, under § 63 (3) of the Insurance Law of the State of New York unconstitutional by reason of the fact that it impairs the obligation of the contract between the United States and the Casualty Company of America and as such violates the provisions of Article I, Section 10, Clause 1, of the Constitution of the United States?

5. Is the disallowance and dismissal of the claim of the claimant, under § 63 (3) of the Insurance Law of

the State of New York unconstitutional by reason of the fact that it deprives the claimant herein of its vested right under the bond between the United States and the Casualty Company of America and takes property without due process of law and as such violates the provisions of the Fourteenth Amendment of the Constitution of the United States?

6. Are the Courts of New York obligated to follow the decisions of the Federal Courts in interpreting 33 U. S. Statutes at Large, 778, and to hold that the right of a materialman against a surety on a bond of a contractor to the United States Government under the provisions of this Statute accrues immediately and that the right of action is merely suspended until six months after the completion and final settlement of the contract?

7. If the claim of the claimant is allowed, is it entitled to priority of payment under the provisions of 33 U. S. Statutes at Large, 778?

ARTHUR F. GOTTHOLD.

Sworn to before me this 21st day of November, 1923.

HELEN A. PARKER,
Notary Public,
New York County No. 172,
(SEAL) New York County Register's No. 4111.

Exhibit B.

IN THE

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY.

CHARLES SUMNER BEST, *Plaintiff,* *vs.* CASUALTY COMPANY OF AMERICA, a corporation, under the laws of the State of New York, and JESSE S. PHILLIPS, Superintendent of Insurance of the State of New York, as Possessor and Liquidator of the property of said Casualty Company of America, *Defendants.*	No. 123241 Memorandum Decision.

Plaintiff sues the defendants upon a cause of action accruing to the plaintiff in the State of Washington against the defendant Casualty Company, a New York corporation. Prior to the commencement of the action, but subsequent to the accruing of plaintiff's cause of action, the following order was made in the Supreme Court of the State of New York—

> "ORDERED, that Jesse S. Phillips, and his successors in office as Superintendent of Insurance be, and he hereby is, directed to take possession of the property and liquidate the business of the said Casualty Company of America, under and pursuant to Section 63 of the Insurance Law, and they are hereby vested with the title to all of the property, con-

tracts and rights of action of the said Company, and directed to deal with the same in their own names as Superintendent of Insurance; and the said Casualty Company of America, its officers, agents and employee, and all other persons having any property or effects of the said corporation are hereby directed forthwith to assign, transfer and deliver to the said Superintendent of Insurance, all the said property or effects in whosesoever name the same may be; and it is further

ORDERED, that the officers, agents and employees of the said Company, and all other persons be, and they hereby are, enjoined and restrained from the further transaction of the business of the said corporation, or from dealing with or disposing of the property or assets of the said Casualty Company of America, or from in any way interfering with the said Superintendent of Insurance in the performance of his duties as liquidator; and, until the further order of this court, it is

ORDERED, that the officers, agents, employes, policy-holders, stockholders and creditors of the said Casualty Company of America, and all other persons, be enjoined and restrained from bringing or further prosecuting any action at law, suit in equity or special proceeding against said corporation, or estate, and from making or executing any levy upon the property or assets of the said Casualty Company of America, or from in any way interfering with the said Superintendent of Insurance or his successors in office in the control and management of the property of said corporation or in the discharge of his or their duties as liquidators thereof."

Service was had by serving the Insurance Commissioner of the State, as the law under which the defendant

Casualty Company was permitted to do business in this State provides service may be made upon it.

The defendant Casualty Company appearing specially moves to quash the service and the hearing was on that motion.

Counsel for plaintiff in his written brief submitted concedes that the motion to quash would be well taken if the order of the New York court had included the dissolution of the corporation or had been followed by an order, as the New York law provides, dissolving the corporation, before plaintiff commenced his action and procured service. This concession, as I understand it, is strictly in accordance with the law. The concession, however, makes it unnecessary to enter into any discussion of the question and fixes a bases from which to start, and eliminates many questions raised by counsel in his brief.

The basis of the proposition of law covered by his concession or admitted point is that the New York law which provides for such a dissolution of the corporation is a part of the Charter of the corporation and follows it wherever it goes, and that all who deal with it consent to be bound by such method of dissolution. If this be true, and it is, then why is it not true that the order of the New York court, which is strictly in accord with the New York law, follows the New York, as it stands becomes a part of the Charter of the corporation of the same extent and effect as the order of dissolution would. It must be conceded that if this latter proposition is true, the order is broad enough to sustain this motion.

It seems to me unnecessary to go any further. If the New York law providing for the dissolution of the corporation follows it as a part of its charter, the law of the same State providing for the liquidation of the corporation, and which is a part of the same law as the dissolution provision, must take the same course.

If the plaintiff would be bound by a dissolution order of the New York Court pursuant to the New York law, and thereby precluded from suing the corporation in this State, he must upon the same theory and principle be bound by the liquidation order of the same court pursuant to the same law. The liquidation order and the law pursuant to which it was made specifically precludes a suit against the corporation.

If the liquidation proceedings are completed and finally disposed of without a dissolution order, it may be that the corporation would then be subject to suit in this State. Such a contingency, however, cannot sustain the present action.

Under the liquidation order the plaintiff cannot adjudicate his claim with the corporation in this State or anywhere else. He must now deal with the defendant Superintendent of Insurance of the State of New York. Whether he can sue the Superintendent of Insurance in this court or in this State is a matter not involved in this motion. The motion is on behalf of the corporation alone. No service has been had on the Superintendent.

The cases of *Martyne* vs. *American Union Fire Insurance Co.*, 110 N. E. (N. Y.) 502; *Sinnott* vs. *Hannan*, 108 N. E. (N. Y.) 858; and *Relf, Supt. of Ins.* vs. *Runble*, 103 U. S. 22 (26 L. Ed. 337), in my judgment fully sustain the position here taken. It is true, in all these cases there was a dissolution of the corporation, and in that respect they are not similar to the case at bar, where, as far as the record discloses, there has not been a dissolution of the corporation. However, it would be too narrow a scope to be given these cases to say they apply only where there has been a dissolution of the corporation. All these cases are based on laws practically the same as the law applicable to the case at bar. All of these laws in question provide for the liquidation and dissolution of cor-

porations in the State in which they were incorporated. Liquidation is the principal purpose of the laws in each instance, and dissolution more in the nature of a necessary result, or at least a natural or usual result. In some instances the dissolution is first ordered, in others at the same time as the liquidation order, and in others it is provided dissolution may follow. In all of these cases, these laws, as a whole, as laws immediately affecting corporation, are for that reason given an extraterritorial effect and held to accompany the corporation wherever it goes as a part of its Charter, and for that reason binding upon all who do business with the corporation. This more specifically appears form the Relf case than the others, where the court refers to these laws as following the corporation as a part of its Charter and binding upon all who do business with it both *during the life* of the corporation and after dissolution. There is no magic in the word dissolution or in an order of dissolution that makes dissolution more effective than liquidation. Of course dissolution when complete, absolute and unqualified, renders the corporation dead, and for that reason alone incapable of acting or being sued without any further provision. Liquidation without dissolution leaves the corporation still alive and capable of acting and being sued unless accompanied with some further provision or prohibition. However, if liquidation is accompanied with a prohibition of suits against the corporation, it is just as effectual as long as it stands to preclude suits against the corporation as an accompanying dissolution.

In the *Sinnott* case the situation is just the reverse of that in the case at bar. There the dissolution accompanied the liquidation, but notwithstanding, by a provision of the law, the corporation was empowered to do certain acts and transact certain business looking to the winding up of its affairs.

In one of the three cases cited the Court distinguishes between ordinary receiverships and statutory liquidators and says the rule applicable to the former has no application to the latter, and for that reason the ordinary receivership cases there cited were not in point.

All of the cases cited by counsel for plaintiff in this case are ordinary receivership cases for the reasons stated have no application.

For the reasons stated the motion to quash will be granted.

Done in open court this 20th day of December, 1917.

JOHN S. JUREY,
Judge.